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v. 3028

No. 15540

**United States
Court of Appeals**
for the Ninth Circuit

C. MARTIN WELCH,

Appellant.

vs.

EUGENE L. GRINDLE,

Appellee.

Transcript of Record
(In Three Volumes)

Volume I
(Pages 1 to 364)

**Appeal from the United States District Court for the
Northern District of California.
Southern Division.**

FILED

JUL 18 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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HAROLD C. HOHBACK,

201 Crocker Building,
San Francisco 4, California,

For Appellee.

MESSRS. NAYLOR & NEAL,
401 Russ Building,
San Francisco, California,

For Appellant.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 34531

EUGENE L. GRINDLE,

Plaintiff,

vs.

C. MARTIN WELCH, Doing Business as C. Martin
Welch & Co.,

Defendant.

COMPLAINT

Comes Now, Eugene L. Grindle, the plaintiff
above named, and for cause of action against the
defendant alleges:

I.

That plaintiff, Eugene L. Grindle, is a citizen of
the United States and a resident of San Mateo, Cali-
fornia.

II.

That on information and belief, C. Martin Welch
is a citizen of the United States and a resident of
Millbrae, California, and that he is doing business
under the name of C. Martin Welch & Co., and has
a regular and established place of business at San
Francisco, California.

III.

That this court has jurisdiction of this cause be-
cause the same arises under the patent laws of the
United States of America.

IV.

That United States Letters Patent No. 2,534,644 for a "Liquid Measuring Gauge" filed August 17, 1949, was granted on December 19, 1950, to defendant, C. Martin Welch.

V.

That an actual controversy exists between plaintiff and defendant because plaintiff has demanded an assignment of Letters Patent No. 2,534,644 to him and the defendant has refused to do the same, and defendant has advised plaintiff that if plaintiff undertakes the manufacture and sale of a dipstick incorporating the subject matter of said Letters Patent, defendant will enforce said Letters Patent No. 2,534,644 against plaintiff.

VI.

That plaintiff, Eugene L. Grindle, is an employee of Pan American World Airways, Inc., and was an employee of Pan American World Airways, Inc., at the time he invented the subject matter of said Letters Patent.

VII.

That prior to April 28, 1948, plaintiff, Eugene L. Grindle, conceived the invention embodied in the subject matter of Letters Patent No. 2,534,644 and made a working model of the invention, tested it and found it operable.

VIII.

That on or about April 28, 1948, plaintiff, Eugene L. Grindle, disclosed and gave to defendant, C.

Martin Welch, a plastic fuel tank dipstick embodying the material portion of the invention in said Letters Patent (the fuel tank dipstick still being in possession of defendant) and requested a quotation on supplying the same to Pan American World Airways, Inc. At the same time, plaintiff gave a sketch to defendant which had been prepared by plaintiff on the special plastic molding from which the sticks were to be fabricated. After receiving the above, defendant gave the opinion that the special plastic molding proposed by plaintiff would be very expensive to fabricate in that special dies would be required. At the same time defendant gave to plaintiff several pieces of standard extruded plastic tubing, some of the tubing being $\frac{3}{4}$ " x $\frac{3}{4}$ " and asked plaintiff if he could use any of this standard plastic tubing in his proposed dipsticks. Plaintiff then redesigned the dipstick using the $\frac{3}{4}$ " x $\frac{3}{4}$ " square standard plastic tubing and submitted a sketch of the same to defendant for quotation. Defendant then made a quotation and offer of sale on June 6, 1948, to Pan American World Airways, Inc., on the redesigned dipstick. Pan American World Airways, Inc., gave defendant an order for a quantity of the redesigned dipsticks based upon the quotation. Pan American World Airways, Inc., also gave defendant a letter releasing the design to him to market as he saw fit. Defendant delivered the ordered dipsticks and Pan American World Airways, Inc., publicly used the same. Subsequent thereto defendant misappropriated the invention of plaintiff and filed an applica-

tion for Letters Patent on August 17, 1949, without the knowledge or consent of plaintiff, Eugene L. Grindle, or Pan American World Airways, Inc.

IX.

That defendant, C. Martin Welch, falsely swore under oath that he was the original and first inventor of the subject matter of Letters Patent No. 2,534,644 and also falsely swore under oath that the invention had not been in public use or on sale in the United States for more than one year prior to his application for patent.

X.

That Pan American World Airways, Inc., has waived any claim or interest in and to said invention, with the exception of a "shopright."

XI.

That Letters Patent No. 2,534,644 is invalid and void in that defendant was not the original and first inventor of the subject matter of said patent.

XII.

That Letters Patent No. 2,534,644 is invalid and void in that the invention was offered for sale, sold, and publicly used in this country more than one year prior to the date of application for said Letters Patent in the United States.

Wherefore, plaintiff prays:

1. That a judgment be entered decreeing that Letters Patent No. 2,534,644 is invalid and void in

that defendant was not the original and first inventor of the subject matter of said patent.

2. That a judgment be entered decreeing said Letters Patent is invalid and without legal effect and particularly that the patent is barred by statute in that the invention had been in public use or on sale in the United States for more than one year prior to application for Letters Patent.

3. That an order be entered decreeing that said Letters Patent and the invention therein be assigned to plaintiff, Eugene L. Grindle and that defendant is estopped to deny the validity of said Letters Patent because of estoppel by deed and estoppel by conduct.

4. That a judgment be entered decreeing that Eugene L. Grindle has the right to manufacture and sell dipsticks incorporating the subject matter of said Letters Patent.

5. That preliminary and final injunctions issue out of and under the seal of this court enjoining defendant from further manufacture and sale of dipsticks incorporating the subject matter of said Letters Patent in view of the unconscionable conduct of defendant.

6. That defendant be ordered to account to plaintiff for damages suffered by plaintiff by reason of having prevented plaintiff from entering into the manufacture and sale of the dipsticks embodying the subject matter of said Letters Patent.

7. That plaintiff have judgment against defendant for costs and disbursements herein, including reasonable attorneys' fees.

8. That plaintiff have such further relief as is deemed fitting and proper.

FLEHR AND SWAIN,
/s/ HAROLD C. HOHBACH.

[Endorsed]: Filed March 25, 1955.

[Title of District Court and Cause.]

ANSWER

Answering the Complaint on file herein, C. Martin Welch, the defendant herein, admits, denies and alleges as follows:

1. Defendant admits the allegations of Paragraphs I and II of the Complaint on file herein.

2. Defendant denies the allegations of Paragraph III of the Complaint on file herein.

3. Defendant admits the allegations of Paragraph IV of the Complaint on file herein.

4. Defendant, answering Paragraph V of the Complaint on file herein, denies that an actual controversy exists between plaintiff and defendant concerning any subject matter properly or lawfully cognizable in this Honorable Court; admits that

plaintiff has demanded an assignment of Letters Patent No. 2,534,644 to him and that defendant has refused to do the same, but avers that the said demand is wholly without merit or legal justification; defendant denies that he has advised plaintiff that if plaintiff undertakes the manufacture and sale of a dipstick incorporating the subject matter of said Letters Patent, defendant will enforce said Letters Patent No. 2,543,644, and alleges the facts to be that, in a conference held in the office of plaintiff's attorneys, exploring the possibilities of settlement, and attended by plaintiff and his attorney and defendant and his counsel, J. Bruce Fratis, Esq., defendant was asked by one of plaintiff's attorneys, in substance, whether it was defendant's contention that plaintiff did not have the right to make the Dipstick forming the subject of the Letters Patent in suit. to which defendant replied that plaintiff could make the structure called for in a certain drawing of plaintiff's making, but that defendant would enter into no agreement with plaintiff with respect to the plaintiff making the structure forming the subject matter of the Letters Patent in suit.

5. Defendant admits the allegations of Paragraph VI of the Complaint on file herein save and except to deny plaintiff's claim of invention of the subject matter of the Letters Patent in suit.

6. Defendant denies the allegations of Paragraph VII of the Complaint on file herein.

7. Answering Paragraph VII of the Complaint on file herein, defendant denies that on or about

April 28, 1948, or at any other time, plaintiff disclosed and gave to defendant a plastic fuel tank dipstick embodying the material portion of the invention in the Letters Patent in suit and requested a quotation on supplying the same to Pan American World Airways, Inc., and defendant denies that he has in his possession any fuel tank dipstick given him by plaintiff, but defendant admits that some time after April 28, 1948, and following plaintiff's previous disclosure thereof to various other manufacturers in plaintiff's quest for manufacturing quotations, plaintiff disclosed and gave to defendant a model and sketch of a plastic fuel tank dipstick asserted to be of plaintiff's origination and differing substantially from the subject matter of the Letters Patent in suit and requested a quotation on supplying the same to Pan American World Airways, Inc.

Further answering Paragraph VIII of the Complaint on file herein, defendant admits that following receipt of the aforesaid model and sketch, defendant gave the opinion that the special plastic molding proposed by plaintiff was impracticable and would be very expensive to fabricate in that special dies would be required.

Answering further said Paragraph VIII of the Complaint on file herein, defendant denies that at the time of giving the opinion above referred to, defendant gave to plaintiff several pieces of standard plastic tubing, as such, and asked plaintiff if he could use any of the same in his proposed dipsticks, and defendant alleges the facts to be that upon that

occasion defendant handed to plaintiff a mock-up model of a dipstick assembly embodying substantially the subject matter of Claim 1 of the said Letters Patent in suit, but less the end plugs defined therein, which defendant, with the aid of others, had designed and made to demonstrate a dipstick that could feasibly be manufactured in lieu of the device theretofore disclosed to defendant by plaintiff.

Answering further said Paragraph VIII of the Complaint on file herein, defendant denies that plaintiff then redesigned the dipstick using square standard plastic tubing, and alleges the facts to be that plaintiff merely caused a drawing to be prepared according to the mock-up model of the dipstick assembly supplied by defendant to plaintiff and submitted a print of same to defendant for quotation. Defendant admits that he made a quotation and offer of sale on or about June 6, 1948, to Pan American World Airways, Inc., as to dipsticks of defendant's design, but denies that the same appertained to any redesign attributable to plaintiff. Defendant admits that Pan American World Airways, Inc., gave defendant an order for a quantity of the dipsticks redesigned as aforesaid and based upon defendant's quotation and admits that Pan American World Airways, Inc., also gave defendant a letter, authored by plaintiff herein, releasing the design to defendant to market as he saw fit.

Answering further said Paragraph VIII of the Complaint on file herein, defendant admits that

thereafter he delivered the ordered dipsticks made as defined in Claim 1 of said Letters Patent in suit, and Pan American World Airways, Inc., publicly used the same. Defendant admits that on August 17, 1949, he filed the application for said Letters Patent in suit, but denies that knowledge or consent of plaintiff or Pan American World Airways, Inc., were proper or necessary conditions precedent thereto and denies that, at any time, defendant misappropriated an invention of plaintiff.

8. Defendant denies the allegations of Paragraph IX of the Complaint on file herein, and alleges the facts to be that at all times relative to the preparation and filing of said application of Letters Patent, defendant was acting under the guidance and advice of one Baldwin Vale, a Registered Patent Agent, now deceased.

9. Defendant admits that Pan American World Airways, Inc., has waived any claim or interest in and to plaintiff's alleged invention, with the exception of an alleged "shopright," as alleged in Paragraph X of the Complaint on file herein, and avers that the same was given at the request of plaintiff herein as an afterthought and in addition to and notwithstanding the prior release given by said Pan American World Airways, Inc., to defendant.

10. Defendant denies the allegations of Paragraph XI of the Complaint on file herein.

11. Defendant admits the allegations of Paragraph XII of the Complaint with respect to Claim 1

of said Letters Patent, but denies the same with respect to Claims 2 and 3 thereof.

As and for Further Answer and by Way of Special Defenses, Defendant Avers as Follows:

1. Defendant asserts that this Court is without jurisdiction of the subject matter of this cause in that it is based upon a claim of title to the Letters Patent in suit justiciable in the Courts of the State of California, and there is no genuine or actual controversy existing between the parties relative to validity or infringement such as is cognizable by this Court under the Declaratory Judgment Act.

2. The right of action set forth in the Complaint did not accrue within the three-year period before the commencement of the action, as required by the applicable Statute of Limitations, and particularly the Statute of Limitations of the State of California (Calif. Code Civ. Proc. Sec. 338 (4)).

3. Plaintiff had knowledge or was chargeable with knowledge or had constructive notice of the fact that defendant had made application for and was granted the Letters Patent in suit for more than three (3) years prior to the commencement of this action, wherefore plaintiff's asserted claim is barred by the California Statute of Limitations (CCP 338 (4)).

4. Plaintiff having knowledge or being chargeable with knowledge or having had constructive notice of the fact that defendant had made appli-

cation for and was granted the Letters Patent in suit for more than three (3) years prior to the commencement of this action and having nevertheless remained silent and inactive, is guilty of gross laches and acquiescence and the asserted claim should, therefore, be dismissed.

5. Plaintiff having knowledge or being chargeable with knowledge or having had constructive notice of the fact that defendant had made application for and was granted the Letters Patent in suit for more than three (3) years prior to the commencement of this action and further having actual knowledge that defendant was building up a business in the manufacture and sale of the Dipsticks forming the subject matter of the Letters Patent in suit pursuant to and in reliance upon the June 10, 1948, release granted defendant by Pan American World Airways, Inc., and plaintiff having remained silent from June 10, 1948, to approximately the date of commencement of this action, and plaintiff having participated in the preparation and grant of said release, plaintiff is now estopped from asserting that defendant's conduct in the manufacture and sale of the said Dipsticks pursuant to the said release has been anything but lawful and proper.

6. If plaintiff, in fact, invented a Dipstick or the Dipstick forming the subject matter of the Letters Patent in suit, said invention was made pursuant to the specific request of his employer and

during the course of his employment and, absent agreement to the contrary, the entire right, title and interest in and to said invention belonged to Pan American World Airways, Inc., in consequence whereof Pan American World Airways, Inc., had the right to grant the release of June 10, 1948, to defendant, and plaintiff is wholly without right or authority to revoke the said release either directly or indirectly.

7. If plaintiff, in fact, invented a Dipstick or the Dipstick forming the subject matter of the Letters Patent in suit and had any right therein paramount to or jointly with the rights of his employer, Pan American World Airways, Inc., at the time said Pan American World Airways, Inc., granted the June 10, 1948, release to defendant, plaintiff waived those rights and consented to the release by Pan American World Airways, Inc., to defendant by participating in the preparation and granting of said release and is now estopped to assert any right against the defendant adverse to or in derogation of the rights released to the defendant by said Pan American World Airways, Inc.

8. The defendant, by virtue of a letter dated June 10, 1948, from Pan American World Airways, Inc., releasing the design of the Dipsticks to defendant to market as he saw fit, was duly licensed to make and sell the said Dipsticks and has acted pursuant to the said license in his manufacture and sale of the same.

9. Defendant alleges that plaintiff is not genuinely in the business of making and selling Dipsticks embodying the invention forming the subject matter of any of the claims of the Letters Patent in suit in the sense or degree that would give rise to the existence of an actual controversy concerning infringement or validity of the Letters Patent in suit, but on the contrary plaintiff has merely gone through the motions with respect to manufacture and sale of said articles in an abortive attempt to create an actual controversy cognizable by this Court under the Declaratory Judgment Act and therefore this action is a sham action that should be dismissed.

10. Plaintiff, having commenced this action upon the basis of a stale claim respecting title to the Letters Patent in suit and upon the basis of a sham action with respect to a non-genuine claim of existence of an actual controversy between the parties, is not acting in good faith in the commencement and prosecution of this action and the same should, therefore, be dismissed.

Wherefore, Defendant Prays:

1. That it be ordered that Plaintiff take nothing by his complaint on file herein and that the same be dismissed with costs to the defendant.

2. That plaintiff be ordered to pay unto defendant his reasonable attorneys' fees incurred in the defense of this action.

3. That defendant have such other and further relief as may be deemed meet and just.

NAYLOR & NEAL,
JAS. M. NAYLOR,
FRANK A. NEAL,

By /s/ JAS. M. NAYLOR,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 29, 1955.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL
COMPLAINT

Comes Now Eugene L. Grindle, the plaintiff above named, and for cause of action against the defendant alleges:

I.

That plaintiff, Eugene L. Grindle, is a citizen of the United States and a resident of San Mateo, California.

II.

That on information and belief, C. Martin Welch is a citizen of the United States and a resident of Millbrae, California, and that he is doing business under the name of C. Martin Welch & Co. and has a regular and established place of business at San Francisco, California.

III.

That this court has jurisdiction of this cause because the same arises under the patent laws of the United States of America.

IV.

That United States Letters Patent No. 2,534,644 for a "Liquid Measuring Gauge," filed August 17, 1949, was granted on December 19, 1950, to defendant, C. Martin Welch.

V.

That an actual controversy exists between plaintiff and defendant. The plaintiff has now, and did have on or about October 1, 1953, the immediate intent to manufacture and sell dipsticks made in accordance with Plaintiff's Exhibit 8 and the disclosure of Letters Patent No. 2,534,644. Plaintiff is president of Deterjet Corporation and has orally licensed Deterjet Corporation to manufacture and sell dipsticks. Plaintiff has made a cost study on the feasibility of manufacturing and selling dipsticks. Plaintiff, through Deterjet Corporation, has requested and received quotations on the wood fillers and plastic extrusions required. Deterjet Corporation has assets of approximately \$11,000.00 which it intends to use for the manufacture and sale of dipsticks. Deterjet Corporation, at the present time and for the past several years, has been manufacturing and selling vibrometers to the airlines and the Air Force. Plaintiff has caused Deterjet Corporation to have made master templates to produce

the scales required in the manufacture of dipsticks at a cost of nearly \$500.00. Plaintiff has also caused Deterjet Corporation to have manufactured special tools and jigs to assist in the manufacture and sale of dipsticks. Plaintiff has caused Deterjet Corporation to make up several production models which have been accepted. Plaintiff has been threatened with infringement litigation in that defendant advised plaintiff that if plaintiff undertakes the manufacture and sale of a dipstick incorporating the subject matter of said Letters Patent, defendant will enforce said Letters Patent against plaintiff.

VI.

That plaintiff, Eugene L. Grindle, is an employee of Pan American World Airways, Inc., and was an employee of Pan American World Airways, Inc., at the time he invented the subject matter of said Letters Patent.

VII.

That prior to April 28, 1948, plaintiff, Eugene L. Grindle, conceived the invention embodied in the subject matter of Letters Patent No. 2,534,644 and made a working model of the invention, tested it and found it operable.

VIII.

That on or about April 28, 1948, plaintiff, Eugene L. Grindle, disclosed and gave to defendant, C. Martin Welch, in trust and confidence a plastic fuel tank dipstick embodying the material portion of the invention in said Letters Patent (the fuel tank

dipstick still being in possession of defendant) and requested a quotation on supplying the same to Pan American World Airways, Inc. At the same time, plaintiff gave a sketch to defendant which had been prepared by plaintiff on the special plastic molding from which the sticks were to be fabricated. After receiving the above, defendant gave the opinion that the special plastic molding proposed by plaintiff would be very expensive to fabricate in that special dies would be required. At the same time defendant gave to plaintiff several pieces of standard extruded plastic tubing, some of the tubing being $\frac{3}{4}$ " x $\frac{3}{4}$ " and asked plaintiff if he could use any of this standard plastic tubing in his proposed dipsticks. Plaintiff then redesigned the dipstick using the $\frac{3}{4}$ " x $\frac{3}{4}$ " square standard plastic tubing and submitted a sketch of the same to defendant for quotation. Defendant then made a quotation and offer of sale on June 6, 1948, to Pan American World Airways, Inc., on the redesigned dipstick. Pan American World Airways, Inc., gave defendant an order for a quantity of the redesigned dipsticks based upon the quotation. Pan American World Airways, Inc., also gave defendant a letter releasing the design to him to market as he saw fit. Defendant delivered the ordered dipsticks and Pan American World Airways, Inc., publicly used the same. Subsequent thereto defendant fraudulently misappropriated the invention of plaintiff and filed an application for Letters Patent on August 17, 1949, without the knowledge or consent of the plaintiff, Eugene L. Grindle, or Pan American World Air-

ways, Inc., and in violation of the trust and confidence reposed in him. Plaintiff was transferred on June 1, 1949, from the Engineering Department at Pan American World Airways, Inc., where he had designed the dipstick into another department where he had no contact with the dipstick program of Pan American World Airways, Inc. Plaintiff did not discover the fraudulent act of the defendant until September 28, 1953, when he was called in to witness a calibration check of the fuel tanks of B-377 aircraft at which time his attention was called to the fact that a patent number appeared on the dipstick being used in the test. Plaintiff was aware of no facts before that time that would have aroused any suspicion that the defendant had patented plaintiff's dipstick. Since September 28, 1953, plaintiff has been diligently pursuing his rights against the defendant.

IX.

That defendant, C. Martin Welch, falsely swore under oath that he was the original and first inventor of the subject matter of Letters Patent No. 2,534,644 and also falsely swore under oath that the invention had not been in public use or on sale in the United States for more than one year prior to his application for patent.

X.

That Pan American World Airways, Inc., has waived any claim or interest in and to said invention, with the exception of a "shopright."

XI.

That Letters Patent No. 2,534,644 is invalid and void in that defendant was not the original and first inventor of the subject matter of said patent.

XII.

That Letters Patent No. 2,534,644 is invalid and void in that the invention was offered for sale, sold, and publicly used in this country more than one year prior to the date of application for said Letters Patent in the United States.

Wherefore, plaintiff prays:

1. That a judgment be entered decreeing that Letters Patent No. 2,534,644 is invalid and void in that defendant was not the original and first inventor of the subject matter of said patent.

2. That a judgment be entered decreeing said Letters Patent is invalid and without legal effect and particularly that the patent is barred by statute in that the invention had been in public use or on sale in the United States for more than one year prior to application for Letters Patent.

3. That an order be entered decreeing that said Letters Patent and the invention therein be assigned to plaintiff, Eugene L. Grindle, and that defendant is estopped to deny the validity of said Letters Patent because of estoppel by deed and estoppel by conduct.

4. That a judgment be entered decreeing that Eugene L. Grindle has the right to manufacture

and sell dipsticks incorporating the subject matter of said Letters Patent.

5. That preliminary and final injunctions issue out of and under the seal of this court enjoining defendant from further manufacture and sale of dipsticks incorporating the subject matter of said Letters Patent in view of the unconscionable conduct of defendant.

6. That defendant be ordered to account to plaintiff for damages suffered by plaintiff by reason of having prevented plaintiff from entering into the manufacture and sale of the dipsticks embodying the subject matter of said Letters Patent.

7. That plaintiff have judgment against defendant for costs and disbursements herein, including reasonable attorneys' fees.

8. That plaintiff have such further relief as is deemed fitting and proper.

FLEHR & SWAIN,
PAUL D. FLEHR,
JOHN F. SWAIN,
HAROLD C. HOHBACH,
/s/ HAROLD C. HOHBACH,
Counsel for Plaintiff.

[Endorsed]: Filed March 1, 1956.

[Title of District Court and Cause.]

MOTION TO REOPEN CASE AND FOR
ORDER REVOKING DISCLAIMER

Now comes C. Martin Welch, defendant herein, and respectfully moves the Court to reopen the case for the purpose of taking further evidence herein and for an order revoking the disclaimer of Claim One (1) of the Letters Patent in suit.

The motion will be based upon the affidavits of C. Martin Welch, defendant herein, and Francis J. Burke, filed concurrently herewith, the papers and record on file herein including the Reporter's Transcript of Proceedings and the exhibits introduced herein, and the accompanying Memorandum of Points and Authorities.

NAYLOR & NEAL,
JAS. M. NAYLOR,
FRANK A. NEAL,

By /s/ JAS. M. NAYLOR,
Attorneys for Defendant.

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF C. MARTIN WELCH SUP-
PORTING MOTION TO REOPEN CASE
AND FOR ORDER REVOKING DIS-
CLAIMER

State of California,
City and County of San Francisco—ss.

C. Martin Welch, being first duly sworn, deposes and says:

(1) That he is the defendant in the above-entitled action;

(2) That he has read and knows of the complaint and answer on file herein;

(3) That in approximately the months of March and April, 1955, the complaint on file herein and particularly Paragraphs VIII, IX and XII thereof, were read and interpreted for affiant by his counsel, Jas. M. Naylor and Frank A. Neal, and it was explained to affiant that available records should be carefully checked and scrutinized by affiant to determine the earliest effective "Public use or on sale" date with respect to Dipsticks embodying the subject matter of the Letters Patent in suit, in relation to the one-year period preceding August 17, 1949, the filing date of the application which matured into the Letters Patent in suit;

(4) That from the nature and character of the records kept by affiant in the years 1948-1949 it was

impossible to determine accurately therefrom the precise date of public use or sale of the subject devices;

(5) That for this reason, and in accordance with the suggestion of his counsel, affiant asked leave to inspect the pertinent records of Pan American World Airways System at Mills Field, California, to determine the precise date of delivery of the first batch of Dipsticks to said company; that affiant was informed that the records of said Pan American Airways for the year 1948 had been microfilmed; that affiant was told to wait while one of the employees of Pan American World Airways System located the pertinent reel of microfilm; that shortly afterwards affiant was escorted into a viewing room and was granted the privilege of viewing, specifically, a Receiving Report purporting to be dated August 12, 1948, No. 49986 (Plaintiff's Exhibit 17 herein), and purporting to evidence the fact that on said date affiant delivered 54 Fuel Tank Dipsticks to said Pan American World Airways System and that seven (7) of the same were rejected;

(6) That relying on the said microfilmed copy of said Receiving Report of Pan American World Airways System in good faith, and having then discovered nothing of record anywhere to the contrary, affiant duly reported his findings to his counsel and, in response to questioning about the same, advised his counsel that he was reluctantly obliged to admit that the delivery of the Dipsticks to said Pan American World Airways System had taken place

on August 12, 1948, or five (5) days more than one (1) year prior to the filing of affiant's application for the Letters Patent in suit on August 17, 1949, and affiant authorized the preparation of the answer on file herein admitting the invalidity of Claim 1 of said patent;

(7) That on or about February 6th, 1956, affiant authorized his counsel to implement the admission of the answer on file herein by the filing of a disclaimer of Claim 1 (one) of the Letters Patent in suit, and Defendant's Exhibit I-1 is a copy thereof;

(8) That upon the trial of the cause affiant heard the evidence adduced by plaintiff herein, both oral and documentary, concerning the asserted date of August 12, 1948, as the first "Public use or on sale" date for Dipsticks embodying the subject matter of Claim 1 of the Letters Patent in suit, and particularly the testimony given thereon by Plaintiff Grindle at Tr. PP. 92 to 95, inclusive;

(9) That upon observing Plaintiff's Exhibit 17 and the reason stated thereon for rejection of seven (7) of the Dipsticks, namely, "Scales Improperally (sic) Located in Tube," and hearing the oral testimony bearing thereon, your affiant's suspicions were aroused concerning the reliability of such evidence; that your affiant's doubts about the truthfulness of said evidence were, in large part, based upon the fact that, considering that the initial quantity of Dipsticks for Pan American were made up with one continuous strip of paper chart adhesively affixed

to the wooden core, it would have been quite unlikely for any of the scales to have been improperly located in the tube; that the girl employees of Independent Press Room, Inc., were carefully instructed to set the charts even with the bottom of the wood cores and, to the best of affiant's recollection, these instructions were faithfully carried out;

(10) That affiant, being still unconvinced that the said Receiving Reports of August 12, 1948; (Plaintiff's Exhibits 16 and 17), were true and correct in all respects, acquainted his counsel with the doubts affiant entertained and was advised to make a further and continuing investigation of the facts relative to the delivery date of said initial quantity of Dipsticks to said Pan American World Airways System; that acting in accordance therewith affiant checked the microfilmed records of said Pan American World Airways System and procured photo-prints of the following exhibits which dispute and raise further doubts about the truthfulness and reliability of said Receiving Reports of August 12, 1948, and the testimony adduced and given by Plaintiff Grindle concerning the same;

(11) That whereas the said Receiving Report (Plaintiff's Exhibit 17), a duplicate print of which is annexed hereto as Affidavit Exhibit A, purports to bear the Serial No. 49986 and the date of August 12, 1948, and to show receipt on the stated date of 54 Part Number 32.061.114 C-54DC Fuel Tank Dipsticks, with an undated handwritten correction to state that 7 of the articles were rejected, actually

Receiving Report No. 49700 (Plaintiff's Exhibit 16) also bearing the date August 12, 1948, and purporting to record the fact of rejection of 7 of the Dipsticks and with reference thereon to said Receiving Report 49986 in the past tense in the particular of deletion of said 7 articles therefrom, bears a lower serial number than said Affidavit Exhibit A, by 286 numbers, all as will appear from a photoprint thereof annexed hereto and marked Affidavit Exhibit B.

(12) That what purports to be an inspection report on the initial quantity of 54 Dipsticks delivered by affiant to said Pan American World Airways System, a document that was not produced by Plaintiff Grindle at the time of trial, was dated August 18, 1948, or one day less than the critical one-year period prior to affiant's patent application filing date of August 17, 1949, as will appear from the photoprint thereof annexed hereto as affidavit Exhibit C; that the said memorandum was written and dated in longhand by a person who signed with the initials "W.T.H.," and directed that a change be made on said Receiving Report of August 12, 1948 (affidavit A), which, if said Affidavit Exhibit B is to be believed, had already been accomplished as plainly stated thereon;

(13) That Pan American World Airways System Receiving Report No. 51133, bearing date of August 23, 1948, a photoprint of which is annexed hereto as Affidavit Exhibit D, purports to record the receipt from affiant of 24 additional Dipsticks,

whereas Pan American World Airways System Receiving Report No. 50135, a photoprint of which is annexed hereto as Affidavit Exhibit E, bearing a lower serial number by some 998 numbers, is dated some three (3) days later or on August 26, 1948, and purports to record receipt of the final count of 29 Dipsticks from affiant to make up the initial order of 100 (Plaintiff's Exhibit 11);

(14) That contemporary microfilmed records of said Pan American World Airways System show a surprising lack of chronology as to date and serial numbers of Receiving Reports, as shown by the following photoprints:

No. 49999, dated Aug. 4, 1948, Affidavit Ex. F.

No. 50195, dated Aug. 5, 1948, Affidavit Ex. G.

No. 49764, dated Aug. 11, 1948, Affidavit Ex. H.

No. 49715, dated Aug. 17, 1948, Affidavit Ex. I.

(15) That whereas plaintiff, Eugene Grindle, testified on the trial (Tr. 94) that immediately upon receipt of the initial quantity of Dipsticks from affiant he, plaintiff, distributed the same to other employees of said Pan American World Airways System, the earliest record found by affiant of such distribution was Pan American World Airways System Shipping Order No. P22361, dated August 19, 1948, to record the fact of shipment on that date of one (1) of said Dipsticks to one E. A. Del Valle, PAA Resident Engineer, c/o Boeing Aircraft Co., Seattle, Washington, as per photoprint annexed hereto as Affidavit Exhibit J;

(16) That your affiant has read the affidavit of Francis J. Burke, filed concurrently herewith, and knows the contents thereof; that it is affiant's best recollection that Mr. Burke delivered the 100 wooden cores with paper charts pasted thereon to his home in one batch and at the same time that affiant thereupon commenced the assembly work and sealing of the ends to complete the Dipsticks and thereafter delivered the same to Pan American World Airways System;

(17) That while your affiant does not recall a partial delivery by Mr. Burke of wooden cores with charts pasted thereon, he asserts that if such did occur on August 13, 1948, after the Girls' Handwork was done on that day, as set forth in Mr. Burke's affidavit, it would have been physically impossible for affiant to have assembled and sealed 54 of the Dipsticks on that date (August 13, 1948) and delivered the same to Pan American World Airways System on that same day.

(18) That it now appears that your affiant was unwittingly misled into accepting the Pan American World Airways System Receiving Report (Plaintiff's Exhibit 17) of August 12, 1948, at its face value and as a true and correct recording of the actual delivery date of the initial quantity of 54 Dipsticks of the 100 ordered by Pan American World Airways System; that your affiant relied on the same in good faith and in the belief that the same was accurate, but that it now appears that the credibility of said record has been impugned, if

not destroyed, and should not be regarded as a reliable index of the date of delivery for purposes of fixing the one-year period of permissible public use or sale for purposes of determining the validity of Claim 1 of the Letters Patent in suit and especially the disclaimer thereof.

/s/ C. MARTIN WELCH.

Sworn and subscribed before me, a Notary Public, this 23rd day of May, 1956.

[Seal] /s/ LILLIAN PRATHER,
Notary Public.

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANCIS J. BURKE SUP-
PORTING MOTION TO REOPEN CASE
AND FOR ORDER REVOKING DIS-
CLAIMER

State of California,
City and County of San Francisco—ss.

Francis J. Burke, being first duly sworn, deposes and says as follows:

(1) That he resides in the City of Millbrae, County of San Mateo, State of California, and is the Secretary of and a salesman for Independent Press Room, Inc., a California corporation, with its place of business at 300 Broadway, in the City

and County of San Francisco, State of California, and that he has been connected with said concern since prior to the month of July, 1948;

(2) That in the months of July and August, 1948, affiant represented said Independent Press Room, Inc., in the handling and filling of an order for C. Martin Welch covering the imprinting and application of certain gauge sheets or strips to Gasoline Dipsticks or Measuring Rods and, as such, is personally familiar with the history of the work that was done on the said order;

(3) That during the first week of May, 1956, affiant was asked by said C. Martin Welch if affiant could locate any records of said Independent Press Room, Inc., that would show precisely the history of the work that had been done on said order; that by diligent search affiant was able to locate the Cost Record and Job Tracer maintained by said Independent Press Room, Inc., and embracing the months of July and August, 1948, and that Affidavit Exhibit A, annexed hereto, is a photostatic reproduction of the July 29, 1948, page thereof, giving the history of said order No. 50759 of C. Martin Welch for said Aviation Gasoline Measuring Rods, and which page forms a part of the bound volume of said record;

(4) That in order to interpret the entries appearing on Affidavit Exhibit A, as hereinafter set forth, it is first believed necessary to direct attention to the characteristics of the gauge sheets or

graduation charts that were a part of the subject matter of the said C. Martin Welch order, and Affidavit Exhibit B, tendered herewith, is an actual sample of one of said sheets adhesively secured to a wooden core member which sample was unearthed by affiant at the plant of said Independent Press Room, Inc., as a relic of said transaction; that, as will be seen, Independent Press Room, Inc., was asked to produce and did produce integral strips of paper upon which were imprinted certain graduation or depth gauge marks, and that one each of said strips were then adhesively secured to a wooden core stick having grooves mitered in two of its opposite corners; that said Independent Press Room, Inc., produced the said gauge sheets or chart strips in press sheets 8 x 38 inches which were then printed and then trimmed for application to the individual wooden core sticks;

(5) That the said Record, Affidavit Exhibit A, indicates that two zinc line engravings were received complete from Walker Engraving (Walker Engraving Corporation of America, located at 333 Fremont Street, San Francisco, California), and that on Friday, July 30, and Monday, August 2, 1948, 430 impressions were run from said engravings.

(6) That said Record, Affidavit Exhibit A, further shows that on Tuesday, August 3, and Wednesday, August 4, 1948, the said sheets were cut into the aforesaid individual stick strips and that on Thursday, August 3, 1948, attempts were first made

to paste or adhesively secure said individual strips to said wooden cores, as will be noted from an entry on said Affidavit, Exhibit A, under the columnar title, "Girls' Handwork"; that your affiant asserts that the initial efforts at obtaining a successful application of said paper strips to said wooden cores were totally unsuccessful, due to the irregularity of the surface of said wooden cores and the inability of Independent Press Room, Inc., to procure a satisfactory adhesive that would bond the paper to the wood free of bubbles or other surface irregularities, and affiant asserts that the customary glues employed in the bindery of said Independent Press Room, Inc., were tried, but without success;

(7) That affiant interprets the items in said Affidavit, Exhibit A, under the columnar title, "Girls' Handwork," as correctly reflecting the fact that some time was spent by the girl employees of Independent Press Room, Inc., under supervision, on each of the dates, August 3, 4 and 5, 1948; Tuesday, Wednesday and Thursday, respectively, in unsuccessful attempts at finding ways and means of satisfactorily bonding said paper strips to said wooden cores; that on Thursday, August 12, 1948, a fraction of an hour was spent in additional attempts at obtaining a satisfactory bond;

(8) That on Friday, August 13, 1948, additional time in the amount of 1.5 hours was spent in perfecting ways and means of accomplishing the aforesaid task and in commencing the actual work of

bonding said strips to said wooden cores and that on Tuesday, August 17, 1948, the time entry of 3.9 hours indicates to your affiant that the problem had then been solved, as well as it could be solved with a lengthy or continuous strip of paper of the wrap-around type, and that the time spent on that date was adequate to complete the pasting of the said charts to remainder of the 100 plus wooden cores that had been supplied to Independent Press Room, Inc., by said C. Martin Welch;

(9) That upon the completion of the work of said Independent Press Room, Inc., in imprinting, cutting and bonding of said printed gauge strips to said wooden cores, your affiant personally delivered the 100 wooden cores with paper charts adhesively affixed thereto to said C. Martin Welch at his residence in Millbrae;

(10) That is your affiant's recollection that all of the 100 code sticks prepared by said Independent Press Room, Inc., were delivered to said C. Martin Welch at one and the same time and that this occurred after the Girls' Handwork thereon was completed on Tuesday, August 17, 1948, but that if there was a partial delivery of a quantity of the same prior to the final work on August 17, 1948, then the earliest possible date on which a quantity, such as 54 of said coresticks, could have been satisfactorily finished and delivered to Mr. Welch would have been after the work that was done on Friday, August 13, 1948.

/s/ FRANCIS J. BURKE.

Sworn to and subscribed before me this 23rd day of May, 1956.

[Seal] /s/ LILLIAN PRATHER,
Notary Public.

My Commission Expires March 24, 1958.

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

AFFIDAVITS OF ELIJAH V. FROST, PAUL
S. STENSEN, JOHN E. DAVIDSON AND
EUGENE L. GRINDLE AND MEMORAN-
DUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MO-
TION TO REOPEN CASE AND FOR
ORDER REVOKING DISCLAIMER

Affidavit of Elijah V. Frost in Opposition to Defend-
ant's Motion to Reopen Case and for Order
Revoking Disclaimer

State of California,
City and County of San Francisco—ss.

Elijah V. Frost, being duly sworn states:

1. That he is an employee of Pan American World Airways, Inc., at San Francisco International Airport and has been an employee since prior to July of 1948.

2. That in 1948 he held the position of Purchasing Superintendent and that he now holds the posi-

tion of Administrative Assistant to the Supply Manager and that he is very familiar with the operation and the receiving and accounting departments at Pan American.

3. That prior to July, 1948, and for a period of time thereafter the receiving department at Pan Am had three registering machines manufactured by the Standard Register Company of Dayton, Ohio, which were used by the receiving department personnel and that the machines were each in the form of a metal box having a writing table and utilized marginally punched, serially connected forms which were advanced to the writing table by a crank operated sprocket mechanism within the box.

4. That a block of 50 or 100 receiving report numbers was assigned to the receiving clerk by the receiving section to each of the registering machines as needed.

5. That when a shipment was received at Pan Am, one of the receiving clerks would log in the shipment by hand on one of the machines and apply the next unused number assigned to the machine in the appropriate column of the receiving register. A copy of the form of the receiving register used by Pan American is attached hereto as Exhibit 1.

6. That any one of the receiving department personnel were free to use any one of the three machines in logging in any incoming shipment and that no attempt was made by the receiving clerks

to insure that all the receiving report numbers were issued in a numerical sequence.

7. That the receiving register was made up in three copies, and that after the entries had been completed on the register, the original was forwarded to the Invoice Section, the second copy was sent to the typing pool in the Purchasing Section, and the third copy was kept in the machine for the receiving department records.

8. That the typing pool, from the second copy of the receiving report register, typed up individual receiving reports.

9. That the receiving reports typed up for each shipment by the typing pool carried the same number that was assigned the shipment on the receiving register and that the date placed in the upper right-hand corner of the receiving report was the date the shipment was actually entered, and that the date placed in the lower left-hand corner was the date the shipment was accepted or rejected.

10. That a copy of the typed receiving report was filed with the particular purchase order against which it applied.

11. That the purchase order at Pan American was the basic reference and all documents related to the purchase order were filed with it and that such documents included receiving reports, amendments, or other changes to the receiving reports, invoices from the vendor, and pay vouchers to the

vendor for the items received against the purchase order.

12. That after a period of approximately one year, the purchase order and all documents filed therewith were microfilmed and then the purchase order and all the documents were destroyed.

13. That after the receiving report was typed up by the typing pool, one copy was sent to the Invoice Section, one copy was sent to the Purchasing Section, and one copy was sent to the Stores Superintendant.

14. That when the Stores Superintendant received a copy of the receiving report, an entry was made in his Inventory Records to show that they had received the material listed on the receiving report.

15. That the numbers given to the receiving reports served no other purpose than as reference numbers.

/s/ ELIJAH V. FROST.

Subscribed and sworn to before me this 1st day of June, 1956.

[Seal] /s/ M. ELOISE DANA,
Notary Public.

My Commission Expires April 9, 1960.

Affidavit of Paul S. Stensen in Opposition to Defendant's Motion to Reopen Case and for Order Revoking Disclaimer

State of California,

City and County of San Francisco—ss.

Paul S. Stensen, being duly sworn, states:

1. That he is an employee of Pan American World Airways, Inc., at San Francisco International Airport.

2. That he now holds the position of Assistant Manager, Accounting.

3. That several weeks ago a man appeared in the Accounting Department File Room and asked that he be permitted to review some of our records. The file supervisor referred the matter to me and I proceeded to the file room to obtain further details. Upon questioning the purpose of looking at the records, I obtained the impression that he was representing Mr. Grindle in connection with a matter that had been pending for some time and in which I knew Mr. Grindle was interested. With this understanding, I permitted the gentleman to review the records in which he was interested.

/s/ PAUL S. STENSEN.

Subscribed and sworn to before me this 1st day of June, 1956.

[Seal] /s/ M. ELOISE DANA,
Notary Public.

My Commission Expires April 9, 1960.

Affidavit of John E. Davidson in Opposition to Defendant's Motion to Reopen Case and for Order Revoking Disclaimer

State of California,
City of South San Francisco,
County of San Mateo—ss.

John E. Davidson, being duly sworn, states:

1. That he is a lead clerk in the receiving department of Pan American World Airways, Inc., at San Francisco International Airport.

That he held the position of senior clerk in the receiving department in August, 1948, and is very familiar with the receiving department procedures at Pan Am.

3. That approximately five or six weeks ago a man came to the receiving department and asked for Jack Davidson.

4. That I informed him that I was Jack Davidson.

5. That he then stated that he was told that I was familiar with the receiving department procedures in 1948 to which I replied in the affirmative.

6. That he said his name was Welch and he wanted some information about our receiving methods in 1948.

7. That because he was unescorted and it is very common for PAA people from our Atlantic and

Latin-American Divisions to visit our facilities and ask for similar information, I assumed he was a Pan American employee and, therefore, explained in detail how we handled receipt of materials in 1948.

8. That he made special reference to receiving report numbers and I explained that receiving report numbers were assigned in blocks of 50 or 100 as required to each of three machines that were used to log in materials and that the number next in order on a particular machine was assigned to a shipment as soon as it was received and an appropriate entry made on the receiving register in the machine.

9. That he then left and returned about two weeks later with several photostatic copies of 1948 receiving reports with the names Roper and Sanford in the received by column.

10. That he asked if it were possible for receiving report numbers and dates to differ to the extent that an early receiving report number could have a later date than a receiving report with a later serial number.

11. That it was again explained to him that this was a common occurrence.

12. And that two receiving clerks could be entering shipments on separate receiving machines at the same instant and assigning receiving report numbers that were several hundred numbers apart.

13. That I emphasized very emphatically to him (Welch) that receiving report numbers had no correlation to date whatsoever.

/s/ JOHN E. DAVIDSON.

Subscribed and sworn to before me this 5th day of June, 1956.

[Seal] /s/ H. J. CREGAN,
Notary Public.

My Commission Expires January 20, 1959.

Affidavit of Eugene L. Grindle in Opposition to
Defendant's Motion to Reopen Case and for
Order to Revoke Disclaimer

State of California,
City and County of San Francisco—ss.

Eugene L. Grindle, being duly sworn, states:

1. That he is the plaintiff in the above-entitled action.

2. That he has read the affidavit of C. Martin Welch supporting the motion to reopen case and for order revoking disclaimer.

3. That he has read the affidavit of Elijah V. Frost filed concurrently herewith and knows the contents thereof.

4. That he is familiar with the operations of the receiving, supply and accounting departments at Pan American and that the operations of those de-

partments since prior to July, 1948, and for a considerable period of time thereafter was as set forth in the affidavit of Elijah V. Frost.

5. That the numerical sequence of the receiving report numbers has no correlation to the date on which shipments were actually received because of the fact that separate blocks of numbers were assigned to each registering machine and because any one of the machines could be used in receiving a particular shipment.

6. That on August 12, 1948, 54 dipsticks were delivered to Pan Am on purchase order No. 30-17541 by the Plastic Process Company and that on the same day all 54 of the dipsticks were received by Pan Am.

7. That receiving report No. 49986 (Plaintiff's Exhibit 17 and Exhibit A of the Welch affidavit) was typed up upon receipt of the receiving register copy from the receiving department and that the receiving report number used corresponded with the number given the shipment on the receiving register.

8. That after receiving report No. 49986 had been typed up, one copy of the receiving report was sent to the invoice section and was received by them on August 13, 1948, as set forth by the date stamp appearing on the receiving report.

9. That the date stamp appearing on the receiving report No. 49986 corroborates the fact that the

dipsticks were actually received by Pan Am on August 12, 1948.

10. That upon receipt of the dipsticks he was called in to inspect the same and caused seven of the dipsticks to be rejected because the scales were improperly located in the tube.

11. That he caused the dipsticks not rejected to be put into public use immediately as set forth on page 94 of the transcript.

12. That receiving report No. 49700 (Plaintiff's Exhibit 16, Welch affidavit, Exhibit B) was prepared to show that seven of the fuel tank dipsticks received on purchase order 30-17541 were faulty and were rejected because the scales were improperly located in the tube; that the report was prepared on August 19, 1948, as shown in the lower left-hand corner; and that the rejected dipsticks were picked up by the defendant on August 20, 1948, as appears from the hand-written notation on the receiving report.

13. That the receiving report No. 49700 carries a notation that the seven faulty dipsticks were deleted from the receiving report No. 49986 and that this is correct because in receiving report No. 49986 the number "54" is crossed out and the number "47" substituted therefor and a notation placed on the receiving report that seven were rejected.

14. That receiving report No. 49700 bears an invoice section date stamp of August 24, 1948, which substantiates the chronology of events.

15. That he has known of other instances of Pan Am receiving material and entering it as being received on a receiving report on one date and then rejecting it days or weeks later after the responsible person at Pan Am had determined that the material was unsatisfactory and had to be rejected.

16. That the decision to accept or reject material is not necessarily made by someone in the receiving department.

17. That when the seven dipsticks were rejected, a notification was prepared on August 18, 1948 (Welch affidavit, Exhibit C), notifying the stores superintendent that the number of dipsticks received on receiving report No. 49986 was reduced by seven.

18. That the fact that the serial number on the later dated receiving report No. 49700 is smaller than the serial number on the earlier dated receiving report No. 49986 only indicates that the number used on receiving report No. 49700 was taken from a different registering machine than was the number for receiving report No. 49986.

19. That receiving report No. 51133 (Welch affidavit, Exhibit D) shows that 24 fuel tank dipsticks were received on August 23, 1948, against the same purchase order No. 30-17541 and that a copy of the typed receiving report was received in the invoice section on August 25, 1948.

20. That receiving report No. 50135 (Welch affidavit, Exhibit E) shows that 29 fuel tank dipsticks

were received on purchase order No. 30-17541 on August 26, 1948, and bears a notation that this included an overshipment of 7 to cover the 7 returned on receiving report No. 49700.

21. That receiving report Nos. 49999, 50195, 49764 and 49715 (Welch affidavit, Exhibits F, G, H and I) merely show that the receiving report numbers are not assigned in strict chronological order.

22. That shipping order P22361 (Welch affidavit, Exhibit J) indicates that one of the dipsticks delivered by the defendant was shipped on August 19, 1948, to Mr. Del Valle, the PAA resident engineer at the Boeing Aircraft Company in Seattle.

23. That the dipstick was sent to Mr. Del Valle because Mr. Del Valle was in the process of purchasing materials for the new Boeing B-377 airplanes that Pan Am had ordered and was for the purpose of showing him that Pan Am was acquiring dipsticks that were probably better and cheaper than those he could acquire from Boeing Aircraft and that this was not part of the distribution for Pan Am use.

24. That the dipstick was sent on shipping order P22361 within one week of when it was received by Pan American even though there was no rush in sending it to Mr. Del Valle since the new Boeing B-377 airplanes were not expected for at least six months.

25. That many of the dipsticks delivered by the defendant had been placed in public use before the dipstick was sent to Mr. Del Valle.

26. That thereafter Pan American ordered dipsticks from the defendant for the Boeing B-377 airplanes and that the defendant, Mr. Welch, delivered such sticks.

27. That Pan Am maintains confidential microfilmed records and that the defendant has seen fit, at any time he desired, to inspect these confidential records by conveying to the employees in charge of the records the impression that he was an employee of the company entitled to inspect the records.

28. That he has talked to Mr. Paul S. Stensen and has read the affidavit of Mr. Stensen and finds that the defendant, Mr. Welch, conveyed the impression that he was working with the plaintiff and, therefore, had a right to inspect the microfilmed records at Pan Am.

29. That he has talked to Mr. John E. Davidson and has read his affidavit and finds that defendant discussed with Mr. Davidson the receiving report numbering procedure used at Pan Am and that Mr. Davidson explained to the defendant the fact that the chronology of the receiving report numbers was not correlated with the shipment receiving dates.

30. That in view of the unconscionable conduct of the defendant, Pan Am has issued a memorandum, attached hereto as Exhibit 1, banning the defendant from the Pan Am base in the future unless he secures consent to enter from the named individuals.

31. That he has read the affidavit of Francis J. Burke supporting the motion to reopen the case and for an order revoking the disclaimer and that he has examined Exhibit A attached thereto.

32. That from Exhibit A of the Burke affidavit, it appears that the defendant gave an order to the Independent Press Room for 400 aviation gasoline measuring rods and that the Independent Press Room gave the order its order number 50759 and dated it July 29, 1948.

33. That Exhibit A also indicates that two zinc line engravings and 150 sheets of paper, measuring 24 x 38, were ordered; that 430 impressions were run on August 2, 1948; that one hour of cutting was performed on July 29, 1948, apparently before any impressions were made; that additional cutting was performed on August 3, 1948, and that four and one-half hours of pasting were performed on August 3rd, 4th and 5th of 1948.

34. That during the trial the defendant testified that Butlers Special Delivery Service delivered, on July 26, 1948, to the Independent Press Room, the wood fillers that he had ordered from Schafer's Mill and that he had been billed by Schafer's Mill for the wood fillers and introduced in evidence as defendant's Exhibit Q, the invoice from Schafer's Mill (Tr. pages 452 to 456), attached hereto as Exhibit 2.

35. That he has examined defendant's Exhibit Q and finds that it contains the item, "500 lin. 1 x 1

to pattern," and that during the trial the defendant, Mr. Welch, interpreted this item to mean 500 lineal feet of wood cut to a particular pattern (Tr. page 453, lines 13 to 14).

36. That he interprets this item of defendant's Exhibit Q to mean that the defendant was billed for 500 lengths or pieces of 1 x 1 wood cut to a pattern and bases his contention on the fact that order number 50759 placed with the Independent Press Room was for 400 aviation gasoline measuring rods and that, therefore, at least sufficient wood must have been delivered to the Independent Press Room to fabricate 400 gasoline measuring rods, and that at the present time he is purchasing similar sections at three cents per foot and since each dipstick filler is approximately three feet in length, 500 such lengths would make 1,500 feet which at three cents a foot would make \$45.00, the amount billed by Schafer's Mill.

37. That the defendant's interpretation that the item covered only 500 lineal feet of wood is incorrect because this would only be sufficient wood filler for approximately 166 gasoline measuring rods.

38. That his position is further substantiated by the fact that Independent Press Room, on August 31, 1948, billed the defendant for 400 aviation gasoline measuring rods in an invoice which is attached hereto as Exhibit 3.

39. That it is apparent from Exhibit A of the Burke affidavit that between August 3, 1948, and

August 17, 1948, 400 scales were pasted on wood fillers rather than just 100 as set forth in the Burke affidavit.

40. That there is nothing on Exhibit A of the Burke affidavit to substantiate Mr. Burke's statement in paragraph 7 of his affidavit that the girls were unsuccessful on August 3rd, 4th and 5th of 1948 in pasting scales on wooden fillers and that it would be more reasonable to assume that by August 5, 1948, the girls at the Independent Press Room had completed the first 100 gasoline measuring rods for the order the defendant had from Pan Am and that they were delivered shortly thereafter to the defendant giving him adequate time to complete the dipsticks to make the delivery of the 54 dipsticks on August 12, 1948.

41. That it is also more reasonable to assume that the remaining 300 aviation gasoline measuring rods were completed on August 12th, 13th and 17th and were subsequently delivered to the defendant before August 31, 1948, since he was billed for 400 gasoline measuring rods on August 31, 1948.

42. That there is a conflict in the evidence as to what type of scales were supplied on the dipsticks first delivered by the defendant to Pan Am (see pages 51 to 53 of Plaintiff's Brief); that it certainly is not clear that the single piece scales were supplied on the first dipsticks supplied to Pan American by the defendant; and that even assuming that single piece scales were supplied on the

first dipsticks delivered by the defendant, this would not prevent the scales and the fillers from being improperly located in the plastic tube.

43. That he has discovered nothing which would question the veracity of any of the information contained on the receiving reports Nos. 49986 and 49700.

/s/ EUGENE L. GRINDLE.

Subscribed and sworn to before me this 1st day of June, 1956.

[Seal] /s/ M. ELOISE DANA,
Notary Public.

My Commission Expires April 9, 1960.

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

ORDER

This is a motion by defendant to reopen this case and for an order revoking the disclaimer previously entered by defendant in accordance with 35 U.S.C. 253.

The Court having heard oral argument and having examined the affidavits and briefs submitted by defendant with his motion, and no good cause appearing therefor, the motion to reopen the case is hereby denied, and the motion for an order revoking the disclaimer is likewise denied.

Dated: June 6th, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed June 7, 1956.

[Title of District Court and Cause.]

MEMORANDUM ORDER

This is a suit for the declaration of invalidity of a patent, No. 2,534,644, and for certain relief incident to the invalidation of that patent, including damages and the assignment of the patent to the claimed true inventor. Jurisdiction arises under 28 U.S.C. 2201.

The patent in question concerns a measuring device to determine the quantity of gasoline in the wing tanks of airplanes, known as a "dipstick." The dipstick is a liquid fuel column gauge, of a type long familiar. A patent issued as long ago as May 26, 1863, to one Hyde (No. 38,681) for a "cask gauge" described the essentials of the gauge as being a tube or cylinder "made of transparent glass, or its equivalent, and left open at either end," enclosed within the center of a square slitted rod "made of wood, metal, gutta-percha, or any other suitable material, so that either end of the rod shall be flush with the ends of the enclosed tube," and with suitable gauging scales marked on the four sides of the enclosing rod, each adapted to a par-

ticular type of cask, so that by observing the level of the fluid in the central measuring tube, the content of the cask or vessel could be ascertained. The operation of the device is the same as that used by children playing with straws. The tube is inserted vertically into the liquid to the bottom of the vessel. The operator then closes the top of the tube, either with his finger, or with some sort of valve, and withdraws the tube. The atmospheric pressure on the lower end of the tube, as it is lifted from the liquid, retains the liquid in the tube (up to its point of specific gravity). Hyde in his 1863 patent said:

“It is evident that the height of the column of liquid thus confined in the tube will indicate the depth of its previous immersion in the body of the fluid, and by comparing this column with a properly graduated scale the quantity of liquid in any given cask or vessel can be accurately ascertained almost at a glance.”

In 1922, another patent was issued to one Schmitt (No. 1,423,156) for essentially the same type of liquid fuel column gauge, differing only in the manner in which the central measuring tube is supported by the outer structure upon which the gradations are marked, and the slits in the outer structure through which the level of the liquid in the measuring tube may be observed.

This was the state of the prior art in liquid fuel column gauges. It is unnecessary to speculate upon

whether the devices described in the Hyde and Schmitt patents were ever sufficiently "inventive" within the meaning of the patent laws to be patentable.

In 1948 the plaintiff in the instant case, Grindle, an engineer employed by Pan American Airways, developed at the request of his employer a dipstick, or liquid fuel column gauge, which would render more satisfactory service than those then in use. Grindle developed, apparently without knowing of the Hyde and Schmitt patents, a stick which consisted essentially of several measuring tubes, rather than one, joined in a single assembly, and made of plastic. He then contacted the defendant, Welch, at that time a representative for a plastics products firm, and handed him detailed drawings and a mock-up sample of the stick he had designed, for the purpose of securing price quotations from the defendant's employer. Defendant's employer returned the plans with the report that the particular shapes of plastic required to accommodate the plaintiff's design would be too costly to manufacture, and sent along several items of standard plastic tubing, called "extrusions," to inquire of plaintiff whether they would be adaptable to his needs. After some experimentation and consideration of various alternative expedients, plaintiff Grindle devised a dipstick incorporating standard plastic extrusion parts. In all essentials, the dipstick, as finally submitted by plaintiff Grindle to defendant Welch and the latter's employer by means of a com-

plete sketch and mock-up sample was the dipstick incorporated ultimately in Patent No. 2,534,644.

At the time of submission of the plans and mock-up of the dipstick to Welch, Grindle had no thought of patenting the stick, and no desire to keep the device secret for purposes of personal commercial exploitation or for any other purpose. He understood that because of the development work done by his employer, Pan American, through himself, the employer would receive a favorable purchase price quotation from the ultimate producer of the stick, whether that producer was to be Welch's employer or Welch himself. There was no disclosure by Grindle to Welch of any confidential nature which could lead to a recompensable breach of trust on the part of Welch.

It appears that during the period of final development of the dipstick, Welch had formed the plan to set himself up in the dipstick manufacturing business. He did so, and commenced to supply dipsticks in conformity with the plans drawn by Grindle. There were two minor variations in the stick as delivered and the stick as designed, and these variations (consisting of the substitution of radial grooves for square cut grooves in the wooden filler which spaced the two plastic measuring tubes inside the over-all square plastic housing tube, and

of the substitution of plastic cement fill for the solid end plugs which Grindle had originally designed to shut off the ends of the square housing tube) were accepted by Grindle for Pan American because they had no appreciable effect on the functioning of the dipstick as designed by Grindle. They were minor details of construction or manufacture, "bugs," that every manufacturer encounters in the construction of his products, and that are eliminated by altering minor details which leave the product as a whole unaffected. The same is true for the protrusion of the tubes beyond the end pieces. Any skilled mechanic, or any person who has had some experience in working with plastics, could have accomplished the substitution of the cement mass for the end plugs, and the radial grooves for the square cut grooves, as well as the protrusion of the tubes beyond the end seals.

Welch commenced production of the sticks and made his first delivery to Pan American on August 12, 1948. That date marked the beginning of public use of the dipstick. Grindle was soon thereafter assigned to other duties and took no further interest in the dipstick. Thereafter, on August 17, 1949, Welch filed for a patent on the dipstick, swearing that he was the true inventor. His patent application contained three claims. Claim 1 was the dipstick as disclosed in Grindle's drawing No. D-32,061,114, published on June 10, 1948. Claims 2 and 3 varied a few minor details of construction as, for example, using end plugs instead of a cement

mass to seal the ends of the plastic housing tube through which the two measuring tubes protruded (the original Grindle drawing had provided for similar end plugs, and was changed to suit the production convenience of Welch), the protrusion of the tubes beyond the end pieces, and adding a nail as an additional means of securing the end plugs. None of the variations of Claims 2 and 3 from Claim 1 were substantial improvements. They were changes of a sort which any mechanic, in or out of the plastics field, might have devised in the course of construction. Essentially, all three claims were the same claim, namely, a claim on the device substantially as pictured in the Grindle drawing of June 10, 1948.

With its customary magnanimity, the Patent Office issued patent No. 2,534,644 to Welch. That patent was void and invalid because not filed by the true inventor; because filed more than one year after the first public use of the product described; because it does not teach invention over the prior art disclosed by the Hyde and Schmitt patents referred to earlier. Each of these grounds of invalidity is sufficient in and of itself to make clear that the patent in question is void and of no effect.

Plaintiff seeks damages for having been prevented from producing his own device, by the threat of the defendant that he would sue plaintiff for patent infringement. In 1953, plaintiff learned that defendant had patented the dipstick and developed its manufacture into a profitable venture.

Not unnaturally, he thereupon decided to do likewise, and to reap the fruits of his own developmental work himself. Defendant thereupon threatened an infringement suit. Plaintiff's proof of damages, however, is insufficient. Only his own testimony as to his putative market is in evidence. Damages, if they were to be awarded here, would be entirely speculative as to both existence and amount. Plaintiff is therefore not entitled to damages.

Plaintiff further seeks an assignment of the invalid patent to himself, and an estoppel of defendant to deny the validity of the patent. In *Kennedy v. Hazleton*, 128 U.S. 667 (1888), the Supreme Court refused to require a defendant to assign a patent which had been issued to someone not the true inventor. Since the patent was void, there was nothing to assign. The Court said:

“As the patent, upon the plaintiff's own showing, conferred no title or right upon the defendant, a court of equity will not order him to assign it to the plaintiff—not only because that would be to decree a conveyance of property in which the defendant has, and can confer, no title; but also because its only possible value or use to the plaintiff would be to enable him to impose upon the public by asserting rights under a void patent. *Post v. March*, 16 Ch. D. 395; *Oldham v. James*, 14 Irish Ch. 81.

“The bill cannot be maintained for an account of profits received by the defendant from

the use of this patent, because a decree for profits can only proceed upon the ground that the plaintiff is at least the equitable owner of the patent, and there can be neither legal nor equitable ownership of a void patent. The same reason is a sufficient answer to the suggestions of the plaintiff that the bill may be maintained as a bill to remove a cloud upon his title in this patent."

Plaintiff has cited a number of cases for the proposition that title to a void, or non-existent, patent may nevertheless be assigned to the true inventor, and the assignor may be estopped thereafter to assert its invalidity. But none of those cases stands for so inherently artificial a proposition. *Zachs v. Aronson*, 49 F. Supp. 696 (D. Conn. 1943) concerned the effect of a prior state judgment in a controversy involving a patent. The federal court held that no grounds for a declaratory judgment action were stated. Regarding the assignability of a void patent, the court said as a matter of dictum that it construed the state judgment "to eliminate the finding that the plaintiff was not the true inventor; it felt that that finding was not essential to the decree." Thus, the court continued, "a direct conflict with the *Kennedy* case is not involved." *Id.* at 698. There was other dictum in the *Zachs* case, regarding the effect which might be given in a federal court to a prior state judgment requiring the assignment of a void patent. That dictum, like the opinion of the Supreme Court in *Bechner v.*

Contoure Laboratories, 279 U.S. 388 (1928), concerns the question of the extent to which the principle of *res judicata* and the interrelationship of federal and state courts require the enforcement of state judgments, although there may be a logical inconsistency in such judgments. These cases arise usually in connection with an assignor's attempt, subsequent to his assignment of a patent, to renege on his assignment and to raise the issue of invalidity. In such circumstances, an estoppel bars the assignor from beclouding the title he has himself purported to confer. See *Westinghouse Co. v. Formica Co.*, 266 U.S. 342, 349 (1924). It should be noted that the decisions in those cases have the effect of preventing the issue of the validity of the patent from being reached by the parties, if the party seeking to raise the issue is the assignor. Cf. *U. S. Appliance Corp. v. Beauty Shop Supply Co., Inc.*, 121 F. 2d 149 (9th Cir., 1941).

In the case at bar, no principle of estoppel bars the plaintiff from raising the issue of invalidity. Indeed, he does no more than invoke a statute of Congress in doing so. However, by the same token, having properly demonstrated the invalidity of the patent, he may not then ignore that invalidity and demand an assignment of the void patent. To follow the plaintiff's theory would be to grant him a patent despite the fact that for five years after its first public use, he made no effort to patent his device; that if he had properly applied for a patent within a year after the first public use of his device,

the patent would have been void for teaching no improvement over prior art; and his grant would be founded on the fact that another had falsely claimed to have been the inventor, although even that claim was made only after the statutory period had elapsed. No result so absurd can be supported by resort to the principles of equitable estoppel.

Although the particular relief sought by the plaintiff is improper, he should not go without some relief to equalize his business opportunity with that of the defendant. Therefore, defendant Welch is enjoined to inform each and every of his past purchases of the dipstick or a substantial equivalent thereof, and each and every person to whom he has offered said dipstick or a substantial equivalent thereof for sale by means of letter of offer, circular, invitation to bid or otherwise, that said dipstick or substantial equivalent thereof is not patented, notwithstanding any previous statement or notation on the sticks or elsewhere to the contrary, and Defendant Welch is further enjoined from continuing to mark any dipsticks or substantial equivalents thereof, or to sell any such dipsticks or substantial equivalents thereof already so marked, with any notation of a patent number or the pendency of a patent, and from advertising, offering, or suggesting in any manner that the dipsticks are patented. Let an appropriate decree, and findings of fact and conclusions of law, if the latter are desired, be prepared by the plaintiff.

I have considered plaintiff's request for counsel

fees and costs, and do not feel that this is a proper case to exercise the power of the court to award such fees and costs. Each party will bear its own costs. It is so ordered.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

[Endorsed]: Filed October 29, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact and Conclusions of Law

The above-entitled cause came on for trial and the court having duly considered the evidence and having been duly advised in the premises makes and adopts the following:

Findings of Fact

1. Plaintiff Eugene L. Gindle is a citizen of the United States and a resident of San Mateo, California.

2. Defendant C. Martin Welch, is a citizen of the United States and a resident of Millbrae, California, and is doing business under the name of C. Martin Welch and Company with a regular and established place of business at San Francisco, California.

3. This is a suit for the declaration of invalidity of patent No. 2,534,644 and for certain relief incident to the invalidation of that patent, including damages and the assignment of the patent to the claimed true inventor.

4. The patent in question concerns a measuring device known as a "dipstick" which is used to determine the quantity of gasoline in the wing tanks of airplanes.

5. The dipstick disclosed in the patent is a liquid fuel column gauge, of a type long familiar.

6. A patent No. 38,681 issued to Hyde on May 26, 1863, for a "cask gauge," which describes the essentials of the gauge as being a tube or cylinder "made of transparent glass, or its equivalent and left open at either end" enclosed within the center of a square slitted rod "made of wood, metal, gutta-percha, or any other suitable material so that either end of the rod shall be flush with the ends of the enclosed tube," and with suitable gauging scales marked on the four sides of the enclosing rod, each adapted to a particular type of cask, so that by observing the level of fluid in the central measuring tube, the content of the cask or vessel can be ascertained.

7. The operation of the Hyde device is the same as that used by children playing with straws. The tube is inserted vertically into the liquid to the bottom of the vessel. The operator then closes the top of the tube, either with his finger or with some sort

of valve and withdraws the tube. The atmospheric pressure on the lower end of the tube, as it is lifted from the liquid, retains the liquid in the tube (up to its point of specific gravity).

8. Hyde, in his 1863 patent stated:

“It is evident that the height of the column of liquid thus confined in the tube will indicate the depth of its previous immersion in the body of the fluid, and by comparing this column with a properly graduated scale the quantity of liquid in any given cask or vessel can be accurately ascertained almost at a glance.”

9. A patent, No. 1,423,156, was issued to Schmitt in 1922 for essentially the same type of liquid fuel column gauge as that of Hyde's, differing only in the manner in which the central measuring tube is supported by the outer structure upon which the graduations are marked, and the slits in the outer structure through which the level of the liquid in the measuring tube may be observed.

10. The Hyde and Schmitt patents show the state of the prior art in liquid fuel column gauges.

11. In the first part of 1948, plaintiff, as an engineer employed by Pan American World Airways, Inc., developed, at the request of his employer, a dipstick or liquid fuel column gauge which would render more satisfactory service than those then in use.

12. The dipstick developed by plaintiff consisted primarily of several measuring tubes, rather than

one, formed in plastic which surrounded paper scales mounted on a wooden filler.

13. (No finding—original finding deleted.)

14. After making up a mock-up sample of the dipstick he had designed together with a detail drawing, plaintiff contacted the defendant, Welch, at that time a representative for Plastic Process Company, Inc.

15. Plaintiff handed the defendant a copy of the detail drawing and this, together with the mock-up sample made by plaintiff, were sent to defendant's employer for securing price quotations.

16. Defendant's employer gave a report that the particular extrusion required to accommodate plaintiff's design would be costly to manufacture and sent along several pieces of standard plastic extrusions to inquire of plaintiff whether they would be adaptable to his needs.

17. After receiving the standard plastic extrusions, plaintiff redesigned his dipstick to incorporate the use of such standard plastic extrusions, and had drawing D-32.061.114 made up showing the same.

18. A copy of drawing D-32.061.114 was then submitted to the defendant.

19. In all essentials, the dipstick as finally submitted by Plaintiff Grindle to Defendant Welch, was the dipstick which is shown in patent No. 2,534,644.

20. At the time of the submission of the mock-up models and drawings of the dipstick to the defendant, plaintiff had no thought of patenting the dipstick and had no desire to keep the dipstick secret for purposes of personal commercial exploitation or for any other purpose. The disclosure by plaintiff of the dipstick he had developed to defendant was not in trust and confidence.

21. Plaintiff understood that because of the development work done by his employer, Pan American, through himself, his employer would receive a favorable purchase price quotation from the ultimate producer of the dipstick, whether that producer was to be Welch's employer or Welch himself.

22. During the period of the final development of the dipstick, Welch formed the plan to set himself up in the dipstick manufacturing business.

23. Defendant requested permission to quote on the dipsticks and after receiving permission from the plaintiff and thereafter an order from plaintiff's employer, commenced to supply dipsticks to plaintiff's employer in conformity with the plans supplied by the plaintiff.

24. The first dipsticks delivered by defendant to Pan American differed slightly from plaintiff's design in that radial grooves were substituted for square cut grooves in the wooden filler and in that a plastic cement fill was substituted for solid end plugs.

25. Since the changes did not affect the proper functioning of the dipsticks, plaintiff accepted the dipsticks for Pan American.

26. The changes made by defendant were minor details of construction or manufacture, "bugs" that every manufacturer encounters in the construction of his products, and that are eliminated by altering minor details which leave the product as a whole unaffected.

27. Any skilled mechanic or any person who has had some experience in working with plastics, could have accomplished the substitution of the cement mass for the end plugs and the substitution of radial grooves for square cut grooves in the wooden filler.

28. Defendant made his first delivery of dipsticks to Pan American on August 12, 1948, and plaintiff caused the dipsticks to be placed in public use on the same day.

29. Soon after August 12, 1948, plaintiff was assigned to other duties at Pan American which had no connection with Pan American's dipstick program.

30. Thereafter, on August 17, 1949, defendant filed a patent application on the dipstick designed by plaintiff and swore that he was the true inventor of the dipstick disclosed in the application.

31. On December 19, 1950, patent No. 2,534,644 was granted to defendant on the basis of the patent application and contained three claims.

32. Claim 1 of the patent reads directly on the dipstick disclosed in plaintiff's drawing D-32.061.114 published on June 10, 1948.

33. Claims 2 and 3 of the patent vary from Claim 1 in a few minor details of construction as, for example, using laminated end plugs (drawing D-32.061.114 called for solid end plugs), the protrusion of the tubes beyond the end plugs and adding a nail as an additional means of securing the end plugs.

34. None of these variations set forth in Claims 2 and 3 are substantial improvements over Claim 1 because they were changes of a sort which any mechanic in or out of the plastics field might have devised in the course of construction.

35. Essentially all three claims of the patent are the same claim, namely a claim on the dipstick substantantially as shown in plaintiff's drawing D-32.061.114

36. Plaintiff did not discover until September 28, 1953, that the defendant had patented the dipstick which plaintiff had disclosed to the defendant and that the defendant had developed the manufacture of the dipsticks into a profitable venture.

37. Plaintiff thereupon decided to also enter into the manufacture and sale of dipsticks to reap the fruits of his own developmental work.

38. Defendant thereupon threatened an infringement suit.

39. Plaintiff seeks an assignment of the invalid patent to himself, and an estoppel of defendant to deny the validity of the patent.

Conclusions of Law

1. The court has jurisdiction of the parties and the subject matter under 28 U. S. C. 2201.

2. A justiciable controversy exists between the parties.

3. The court has ancillary jurisdiction over the non-federal questions relating to the assignment of the patent and damages.

4. There was no disclosure by Grindle to Welch of any confidential nature which could lead to a recompensable breach of trust on the part of Welch.

5. Patent No. 2,534,644 is void because the application was not filed by the true inventor.

6. Patent No. 2,534,644 is void because the dipstick disclosed in the patent was in public use for more than one year before the application was filed.

7. Patent No. 2,534,644 is void because the dipstick disclosed in the patent was published in drawing D-32.061.114 more than one year before the patent application was filed.

8. Each of three claims of Patent No. 2,534,644 is invalid because it fails to define invention over the prior art, particularly Hyde and Schmitt.

9. Plaintiff's proof of damages is insufficient because only his own testimony as to his putative market is in evidence.

10. Plaintiff is not entitled to damages because they would be entirely speculative as to both existence and amount.

11. Plaintiff is not entitled to an assignment of the invalid and void patent.

12. Defendant, Welch, is enjoined to inform each and every of his past purchasers of the dipstick or a substantial equivalent thereof, and each and every person to whom he has offered said dipstick or a substantial equivalent thereof for sale by means of a letter of offer, circular, invitation to bid or otherwise, that said dipstick or substantial equivalent thereof is not patented, notwithstanding any previous statement or notation on the sticks or elsewhere to the contrary, and defendant, Welch, is further enjoined from continuing to mark any dipstick or substantial equivalent thereof, or to sell any such dipstick or a substantial equivalent thereof already so marked with any notation of a patent number or the pendency of a patent, and from advertising, offering or suggesting in any manner that the dipsticks are patented.

13. Plaintiff's request for counsel fees and costs is denied.

14. Each party will bear its own costs.

Done in open court this 3rd day of January, 1957.

/s/ EDWARD P. MURPHY,

U. S. District Judge.

Approved as to form:

NAYLOR and NEAL,
JAMES M. NAYLOR,
FRANK M. NEAL,

By /s/ JAS. M. NAYLOR,
Attorneys for Defendant.

Lodged December 27, 1956.

[Endorsed]: Filed January 3, 1957.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 34531

EUGENE L. GRINDLE,

Plaintiff,

vs.

C. MARTIN WELCH, Doing Business as C. Martin
Welch & Company,

Defendant.

JUDGMENT AND DECREE

This cause having come on for trial in open court and having been heard upon plaintiff's amended complaint, and defendant's answer and other pleadings, proofs and proceedings herein, including oral

argument of counsel and briefs of the respective parties and the court having considered the same and the testimony of the witnesses,

It Is Hereby Ordered, Adjudged and Decreed:

1. That patent No. 2,534,644 is void and invalid as to all three of its claims;

2. That the defendant, Welch, is enjoined and directed to inform each and every of his past purchasers of the dipstick or a substantial equivalent thereof, and each and every person to whom he has offered said dipstick or a substantial equivalent thereof for sale, by means of a letter of offer, circular, invitation to bid or otherwise, that said dipstick or substantial equivalent thereof is not patented, notwithstanding any previous statement or notation on the sticks or elsewhere to the contrary;

3. That the defendant, Welch, is enjoined and directed to inform said purchasers and said persons by a written notice first submitted to the court for approval together with a list of said purchasers and persons, said list not to be disclosed to Plaintiff;

4. That defendant, Welch, his heirs, assigns and successors are permanently enjoined from marking any dipsticks or substantial equivalents thereof, or selling any such dipsticks or substantial equivalents thereof already so marked, with any notation of a patent number or the pendency of a patent, and from advertising, offering, or suggesting in any manner that the dipsticks are patented;

5. That each party will bear its own costs.

Dated this 3rd day of January, 1957.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

Not approved as to form: Modifications to be submitted within five (5) days pursuant to Local Rule 21.

NAYLOR AND NEAL,
JAMES M. NAYLOR,
FRANK M. NEAL,

By /s/ JAS. M. NAYLOR,
Attorneys for Defendant.

Lodged November 13, 1956.

[Endorsed]: Filed January 3, 1957.

Entered January 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that C. Martin Welch, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 4, 1957.

NAYLOR & NEAL,
JAS. M. NAYLOR,
FRANK A. NEAL,

By /s/ FRANK A. NEAL,
Attorneys for Defendant.

[Endorsed]: Filed February 4, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the Defendant in the above-entitled action is about to appeal to the United States Court of Appeals for the Ninth Circuit, from a judgment, entered against him in said action, in said District Court of the United States, Northern District of California, Southern Division, in favor of the Plaintiff in said action.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned American Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the defendant that the said defendant will pay all costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, to which it acknowledges itself bound.

In case of a breach of any condition hereof, the above-mentioned Court may, upon notice to said American Surety Company of New York, surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and under judgment therefore against said surety and award execution therefor.

In Witness Whereof, the corporate seal and name of said Surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 30th day of January, 1957.

[Seal]

AMERICAN SURETY
COMPANY OF NEW YORK,

By /s/ F. E. BUCKINGHAM,
Res. Vice-President.

Attest:

/s/ E. C. SCHOLZ,
Res. Asst. Secretary.

Bond No. 35-570-067

Premium \$10.00 per annum

State of California,
City and County of San Francisco—ss.

On this 30th day of January in the year one thousand nine hundred and fifty-seven before me Shirley M. Conrad, Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared F. E. Buckingham and E. C. Scholz, known to me to be the Resident Vice-President and Resident Assistant Secretary, respectively, of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said

corporation, and they both duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] /s/ SHIRLEY M. CONRAD,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires February 23, 1958.

[Endorsed]: Filed February 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Eugene L. Grindle, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 4, 1957.

FLEHR and SWAIN,
PAUL D. FLEHR,
JOHN F. SWAIN,
HAROLD C. HOHBACH,

/s/ HAROLD C. HOHBACH,
Attorneys for Appellant.

[Endorsed]: Filed February 4, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Eugene L. Grindle, Plaintiff herein, have prosecuted or are about to prosecute an appeal to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered, 195, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a Corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Eugene L. Grindle, Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and no/100 Dollars (\$250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount

which said Surety is bound to pay on account of such breach, and render judgment therefore against it and award execution therefor.

Signed, Sealed and Dated this 4th day of February, 1957.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND;

By /s/ [Indistinguishable],
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 4th day of February, 1957, before me Belle Jordan, a Notary Public, in and for the City and County and State aforesaid, duly commissioned and sworn, personally appeared Erbon Delventrar, known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, and acknowledged to me that he subscribed the name of Fidelity and Deposit Company of Maryland, and acknowledged to me that he subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and his own name as Attorney-in-Fact.

[Seal] /s/ BELLE JORDAN,
Notary Public in and for the State of California,
City and County of San Francisco.

My Commission Expires November 8, 1960.

[Endorsed]: Filed February 4, 1957.

In the United States District Court for the
Northern District of California, Southern Division

No. 34531

EUGENE L. GRINDLE,

Plaintiff,

vs.

C. MARTIN WELCH,

Defendant.

Before: Hon. Edward P. Murphy, Judge.

REPORTER'S TRANSCRIPT

WEDNESDAY, FEBRUARY 8, 1956.

Appearances:

For the Plaintiff:

FLEHR & SWAIN, by
JOHN F. SWAIN, ESQ., and
HAROLD C. HOHBACH, ESQ.

For the Defendant:

NAYLOR & NEAL, by
JAMES M. NAYLOR, ESQ.

* * *

EUGENE L. GRINDLE

the Plaintiff, called as a witness in his own behalf, sworn.

The Clerk: Please state your name and occupation for the record.

A. Eugene L. Grindle, 1062 South Claremont Street, San Mateo.

Direct Examination

By Mr. Hohbach:

Q. Mr. Grindle, are you the plaintiff in this action? A. Yes, I am.

Q. By whom are you employed?

A. Pan-American World Airways.

Q. What is your present position?

A. I am at the present time technical assistant to the chief flight engineer.

Q. Will you give us a brief outline of your background? [28]

A. Yes. I studied a four-year technical course in high school, which consisted of three years of mechanical drawing and various shops and technical courses. And when I got out of high school I went to work for my father who had just started a company called The Gaskill Corporation, primarily engaged in the design of pulverized fuel, heating and air conditioning equipment.

My father had been an inventor most of his life, had many patents, and was working on a new concept of domestic heating equipment. I worked with him for five years, and I was responsible

(Testimony of Eugene L. Grindle.)

personally for several designs that were patented by that company.

Q. Did you continue your education during that time?

A. During that five years I worked for my father I studied and received a degree in mechanical engineering from International Correspondence School. I then, in early 1939, my father's company was in very dire straits and not doing too well, and I left his employ and went to California and went to work for North American Aviation Company as a draftsman and junior engineer.

And I immediately enrolled in extension courses at Cal Tech, and studied aeronautical stress analysis, lofting and layout and completed those courses at Cal Tech.

After a year's time at North American I was—I had achieved the rating of junior design engineer, at which [29] time I was approached and offered a position with Curtiss-Wright Company in St. Louis at a considerable increase in responsibility and income.

And I discussed that with my employer, North American, my superior, and he suggested that it would be good experience for me, so I went to Curtiss-Wright on a year's contract as a design engineer.

After that year I returned to North American Aviation early in 1941, came back as a senior design engineer at North American and was immediately

(Testimony of Eugene L. Grindle.)

given charge of the armament project on the B-25 Mitchell Bomber.

Q. Did you have any people working under you at that time?

A. I had a group of six design engineers working under me at that time. And I worked on that project until the war started, at which time North American, the day after December 7th, sent me on an assignment to the air force to activate all their armament equipment on the B-25's, because they were immediately starting to carry live bombs and ammunition which they had not been doing previously. And I stayed on that assignment for several months on the East Coast working with the Air Force getting their equipment in condition, and worked into all aspects of the aircraft during that time.

In April, 1942, I was sent to England, attached to the Royal Air Force in charge of the Mitchell Bomber project [30] over there. And was immediately engaged in certain design problems to adapt British armament and things to the airplane and instruct them in the operation and maintenance of the aircraft.

After a couple of months I was reassigned to the Mustang fighter project in England to assist Rolls Royce in designing the Rolls Royce engine in the Mustang which we completed and flew the airplane there.

And I was then reassigned to the United States to incorporate the Packard-built Merlin into the

(Testimony of Eugene L. Grindle.)

airplane, and I returned shortly after that project to the United States, and on my trip back to California I met a man from Lockheed Aircraft Company who had heard about me and my work, and he offered me a very responsible job with the Lockheed Company. I accepted that job, resigned from North American, and after a few months of training with Lockheed I was assigned to the Pacific Area as Lockheed representative in charge of all Lockheed technicians in the Pacific, where I stayed until some time in 1945. I was brought back.

And the war seemed to be coming to an end, or at least the Lockheed Company was concentrating now on the development of their Constellation Transport Airplane. So I was called back and sent to Europe to head up the Constellation project there, working again with the Air Force. And I was in Paris when the war ended in Japan. [31]

I was brought back then and immediately assigned to Air France as resident engineer with them to work with them on the purchase of their Lockheed Constellations.

I worked with the design group at Lockheed in adapting and redesigning certain things that we had had experience with in the air force operation. And actually, before I was ever—I ever left for Paris, the Lockheed Company reassigned me to Pan-American World Airways, who had placed a large order for Constellation equipment, and I was sent to San Francisco as the resident engineer

(Testimony of Eugene L. Grindle.)

for Lockheed assigned to Pan-American, where I stayed until the Constellation aircraft on the Pacific Coast were all transferred to New York, and I went with them to New York, stayed there for several months, and came back to Lockheed to be prepared for an assignment in Australia for three years.

And I had been traveling so much by this time that I wanted to stay in the States, and I had been so happy and enjoyed the work with Pan-American in San Francisco that I resigned Lockheed and came up here and went to work with Pan-American. That was in the first of December, 1947.

Q. Could you give us some specific examples of some of your design work prior to this time?

A. Yes. The first thing I can recall is in this pulverized fuel equipment for my father, I designed a feeder for the [32] pulverized fuel hopper which was the first successful device in continually feeding pulverized fuel out of a tank without clogging or tunneling or anything like that.

I also at that time designed an improvement to a combustion blower which was more efficient than the previous burners that were being used.

At North American I designed and they patented in my name an automatic collapsible entrance door that was used in the Mitchell Bombers.

And in the last five or six years I have invented a vacuum cleaner which is a completely new and novel device.

I have invented and applied for patents on an

(Testimony of Eugene L. Grindle.)

aircraft vibrometer for measuring and troubleshooting vibration in airplanes.

Q. Could you tell us at what time you started to work with Pan-American?

A. I started on December 1st, 1947.

Q. What kind of a job did you have with Pan-American?

A. I was hired as a senior aeronautical engineer.

Q. Could you briefly describe some of your duties while you had that job?

A. Yes; I worked in what they called the air frame group which was responsible for the basic aircraft structure and systems, such as the fuel system, the hydraulic system and parts of the electrical system. My job was to handle all [33] service troubles and problems that arose on the systems to which I was assigned.

Q. Do you remember any specific project which you were assigned to?

A. Yes; shortly after I started, just a matter of a month or two months after I started with Pan-American, I was assigned a project of developing a more satisfactory fuel tank dipstick. This was done at the initiation of the flight engineer group at Pan-American, the reason being that they had difficulty with wooden sticks in chipping and clogging valves, and the fact that the sticks broke quite easily, and mainly that the calibration on the sticks was in question.

Q. What were your first steps in developing a new type dipstick?

(Testimony of Eugene L. Grindle.)

A. The first step was to recalibrate the tanks on the airplane to get a correct calibration. We did this under controlled tests on one DC-4 aircraft, and then substantiated our calibration on two other aircraft.

Once this new calibration was arrived at I set out to design a stick that would solve the problems that we had had with the wooden ones and also be more easy to read and a more accurate stick than we had had.

Q. What did you do? Can you relate specifically the sequence of events?

A. Well, one of the first things that I arrived at was [34] that the stick should be made out of plastic because the wooden stick had given so much trouble. Metal sticks had been used in the past and had also been giving trouble and also cost quite a bit. So I had seen other types of plastic sticks used in the past and plastic seemed to be the best material to use for this new one.

I then bought certain sections of plastic and made several different types from the plastic that I had bought, one of which had slight shallow holes drilled in the sides along with the calibration. You stick it in the tank and those holes would fill up with fuel so you can read the level. That was considered rather poor design because you always had to assure that you shook the fuel out of those holes before you could use it again, and it would have also been costly to drill or mold all those holes in it.

(Testimony of Eugene L. Grindle.)

I then devised the idea of a liquid column type of stick and I drew several sections of plastic out of stock to determine what size fluid column could be supported by a vacuum. This was arrived at by physically testing various sizes of tubing. It was determined with the fuel, the specific gravity of fuel that we were using, that you had to use a tube 3/16ths diameter or smaller in order to support the fluid.

My next step was to take another piece of this square extrusion that I had purchased to our development shop [35] and have them bore a 3/16ths hole through the entire length of that tube, and I bought some special type to hot press calibrations on the faces of the square tube. This stick served the purpose very well, but it was considered that it might be expensive, and I had already thought of this idea of enclosing a paper calibration inside of a plastic tube.

Q. Before you go on, is this a sample that was first constructed by drilling a hole longitudinally through a plastic extrusion?

A. Yes, it is.

Mr. Naylor: May I see that before the witness testifies, please, Mr. Hohbach?

Mr. Hohbach: Certainly.

Mr. Naylor: Thank you.

Q. (By Mr. Hohbach): Is this the stick about which you were testifying?

A. Yes, it is. This particular stick was just to be a sample to see if the idea was practical or

(Testimony of Eugene L. Grindle.)

workable. As you can probably see, it was a very difficult job to bore that hole through there and our foreman of our development shop did it himself with a rifle bore. The idea of this stick and its concept was if it were decided upon it would be extruded.

Q. Did you actually test this stick and see that it [36] operated?

A. Yes, indeed. This stick was tested by inserting in the tank and letting it fill up with fluid and holding your finger over it so you could read the fluid level in the tank.

Q. Why do you have graduations on each side of the stick?

A. Well, on the particular airplane that we were designing this for there are four different capacity tanks on the airplane so with a four-sided stick you could accommodate all four of the tanks.

There are two tanks on each side—actually there are eight tanks on the airplane, but one calibration applies to a tank equilaterally on each side of the airplane.

Q. You mean there are two tanks on each plane that have the same capacity; is that correct?

A. That is correct.

Mr. Hohbach: I would like to offer this in evidence as Plaintiff's Exhibit 3.

(Airplane stick marked Plaintiff's Exhibit 3 and received in evidence.)

(Testimony of Eugene L. Grindle.)

Q. (By Mr. Hohbach): After you had made up Plaintiff's Exhibit 3, what did you do after that?

A. Well, I had by this time conceived the idea of printing the calibration, which would be a very cheap method of reproducing the calibration for the number of sticks that [37] we wanted to use, and enclosing that calibration inside of a plastic housing to protect it from wetting.

And I went to our equipment shop, who did our plastic work at that time, and to the master mechanic that was most adept at plastic work, and I myself had taken a piece of $\frac{3}{8}$ ths inch square wooden section 3 feet long, drew up a calibration and made an ozalid print, which is a sort of a blueprinting process, and cemented that paper to the wooden section that I had made, and brought that assembly down to Mr. Herb Montoya, the master mechanic, and gave him sketches as to how I wanted him to enclose that calibration in plastic.

The first sketches and thoughts on the matter were to have the fluid columns in the corners so that you wouldn't have to look through the fluid to read the calibration. This was a very difficult thing for Mr. Montoya to make, and he tried for several days to accomplish what I wanted and explained the difficulty to me that he was having, and I then changed the sketch slightly and had the——

Q. Before you go on with that, could you make a sketch of this sample that Mr. Montoya had constructed as well as you recall from your memory?

(Testimony of Eugene L. Grindle.)

A. Yes, I could.

Mr. Hohbach: I will ask the witness to make the sketch of the model that was made by Mr. Montoya. [38]

A. May I use your table, Your Honor?

It started with a piece of $\frac{3}{8}$ ths inch square tubing around which I cemented the calibration.

Mr. Naylor: May I step up and watch this, Your Honor?

The Witness: After the paper was cemented on there, I then had Mr. Montoya make up sections of plastic $\frac{1}{16}$ th of an inch thick around this thing—a piece like that.

Now the plastic is enclosed except for the ends—the wood is enclosed except for the ends by plastic; the plastic is cemented at all these joints.

Q. (By Mr. Hohbach): Mr. Grindle, while you are sketching this, could you label each one of the pieces, what they are, so it will be clear?

A. This is the paper calibration. Now the object was to have a fluid column in the corner of each of these—each corner of this assembly, and that would be accomplished by putting a solid piece of plastic in the middle of each square piece.

Q. How thick were these pieces of plastic you were putting on?

A. All the plastic used in this entire assembly was $\frac{1}{16}$ th inch thick. The object then was to put a piece of plastic again on the outside of this assembly and you would have a complete stick.

(Testimony of Eugene L. Grindle.)

Now with this area right in here a fluid column in [39] each corner.

Q. Would you label that again, Mr. Grindle?

A. I note that typical for all four corners.

Q. Would you label the plastic portion?

A. This portion in here was plastic, 1/16th inch thick. This portion here was exactly the same and the external portion of plastic was 1/16th inch thick.

Q. Referring to the plastic, what kind of construction is that?

A. It is what would be termed laminated plastic construction with all the joints cemented together with a suitable solvent. At the end of this plug now in order that when it was dipped into the fuel to seal the wooden filler and keep the paper calibration from getting wet, a square sixteenth inch piece of plastic was molded or cemented into each end.

I could best draw that by cross section here. There was a sixteenth inch plastic end plug in each end. [40]

Q. What was the purpose of that end plug?

A. To seal the wooden filler and the paper calibration from getting wet when we dip it in the fuel.

Q. Actually you built the body of this portion by building it from 1/16th inch sheets of plastic?

A. That is correct.

Q. And you made a laminated type of construction? A. Yes.

(Testimony of Eugene L. Grindle.)

Mr. Hohbach: I offer this in evidence as Plaintiff's Exhibit 4.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit 4.

The Witness: And because of those fluid columns in the corner it was difficult for Mr. Montoya to get it sealed properly because there wasn't any support in those corners. So I made a very slight change to the design then to put the fluid column over in the center of the flat space of each of the four sides.

(Sketch marked Plaintiff's Exhibit No. 4 and received in evidence.)

Q. (By Mr. Hohbach): Did you tell Mr. Montoya to do this? A. Yes, I did.

Q. What did he do?

A. Mr. Montoya then constructed the stick in that manner and was successful in producing a working model. [41]

Q. Is this an example of the stick constructed by Mr. Montoya?

A. That is a replica of the stick that he was successful in completing.

Q. Will you describe that stick?

A. Well, this stick consists of $3/8$ ths inch wooden core with calibration—paper calibration cemented to it, and enclosed completely in plastic, including sixteenth inch end plugs and with a fluid column in the center of each of the four flat faces. The idea being that as it was inserted in the tank and fluid filled up in the column you would place your finger

(Testimony of Eugene L. Grindle.)

over it and you would read right through directly the fluid column at the proper level.

Q. How did you build up the plastic portion of this dipstick?

A. This particular one?

Q. Yes.

A. It was laminated, cut up into strips of the right size and then cemented together.

Q. Is that the way Mr. Montoya constructed the original example?

A. This one was constructed exactly the same as the original.

Q. Did you try to follow the same steps in getting this constructed by Mr. Montoya?

A. I did. I retraced my steps as accurately as possible, [42] I believe to the letter, if my memory served me that well, by actually making up the wooden core myself and printing a copy of the calibration and cementing it on the wood and handing Mr. Montoya the wooden core and sketching for him what I wanted him to do.

Q. He made up the sample for you?

A. This sample here was made by a mechanic in Mr. Montoya's shop. Now Mr. Montoya is foreman of the shop—the plastics shop. It was made by one of his mechanics under Mr. Montoya's supervision. That was the stick then that was more or less decided upon, so I then went back and designed a plastic extrusion to embody the details of this sample.

(Testimony of Eugene L. Grindle.)

Q. Why did you think—why did you go to the work of designing a plastic extrusion?

A. Well, to produce a thing of this kind in the laminated form would be very costly and very time consuming, and an extrusion process is much more adaptable to production methods. We have made numerous extrusions—I have designed numerous extrusions myself in the aircraft industry, both with North American and since being with Pan-American.

Q. You were actually satisfied, though, that this dipstick you had made by Mr. Mitchell would work and you were ready to go on and try to get somebody to produce it?

A. We were satisfied to the extent that this was the type of stick that we wanted. The question of durability, the [43] amount of handling and mis-handling that the stick would take which was still in question and could not be evaluated until a production model was available.

Q. Who made up this sketch that you were talking about?

A. The sketch of the extrusion I drew myself.

Q. Could you describe what you showed on that sketch?

A. Yes. It was a one-piece section of tubing with the essential dimensions of this sample, and I asked for lengths in 12 foot lengths, which was sort of a standard length for extrusions. That was probably the cheapest length to purchase and handle.

(Testimony of Eugene L. Grindle.)

Mr. Hohbach: Your Honor, I would like to introduce that as an exhibit, Plaintiff's Exhibit 5, as an example of the original construction of the dipstick made by Mr. Montoya.

Mr. Naylor: I suppose this goes to weight, Your Honor, but it has been admitted here that this was a replica device made eight years after the event, calling on the man's memory alone.

The Court: I will receive it in evidence.

The Witness: The reason I reconstructed——

The Court: These four little holes here, that is where the fuel goes?

A. That is where the marking goes.

(Working sample of dipstick marked Plaintiff's Exhibit [44] 5 and received in evidence.)

Q. There is one little hole or aperture there for each tank? A. That is correct.

Q. One is for the number one and number four main tanks you have designated here?

A. That's right.

Q. The other for number one and four tank——

A. Auxiliary.

Q. Auxiliary tanks?

A. Yes.

Q. Now this plug which is here at the end, is that wood?

A. No, that is plastic, Your Honor. That is clear plastic; it is like the rest of it. It is actually a sixteenth inch strip, the same thickness as these other pieces.

(Testimony of Eugene L. Grindle.)

The reason I produced this replica was because the original sample was never returned from the Plastic Process Company in Los Angeles, and it was my understanding from Mr. Welch that it may have been lost in the fire in Los Angeles.

Q. (By Mr. Hohbach): Is this the copy of the drawing that you made?

A. This is an ozalid print of the drawing I made. It calls for this plastic extrusion in 12 foot lengths made from clear lucite or equivalent. And also, Your Honor, that embodies the same details as that sample. [45]

Mr. Hohbach: You may have that copy, Your Honor. I have another copy for Mr. Grindle,

Q. I notice the number 144 on the sketch. What did you intend to convey by that?

A. That calls for 144 inch length, or 12 foot lengths of extrusion.

Q. Would you describe in detail what you show in the cross-sectional view?

A. Yes, the cross-section shows a plastic extrusion here, or proposed plastic extrusion with a $\frac{3}{8}$ ths inch square core which would receive the wooden core with the calibration on it, and in the center of each flat face is a fluid column. The dimensions are a sixteenth of an inch by three-sixteenths long. The idea would be to buy the extrusion. We were intending to insert the calibration and seal the ends in our own shop.

Q. What number does the drawing carry?

A. It carries drawing No. A-14.123.116.

(Testimony of Eugene L. Grindle.)

Q. What is the date of the drawing?

A. The date of the drawing is April 28th, 1948.

Q. Does the drawing bear your signature?

A. The drawing bears my name as designer and is checked by initials R.A.C., which is Ray Chong, our chief draftsman.

Q. You recall making this drawing yourself?

A. Yes, I do. [46]

Mr. Hohbach: I offer this in evidence as Plaintiff's Exhibit 6.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Sketch received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Hohbach: After you had made the drawing what did you do next?

A. The next step then was to consult with plastic extrusion manufacturers. It was my procedure, as well as most engineers out there, that when they designed things in a specialty field such as plastics or special equipment that was designed by specialty manufacturers, that we would design what we wanted, and then discuss it with them. They usually offered suggestions that would be for the purpose of adapting our design to their particular production methods.

Q. Why did you only show the extrusion on this drawing, Plaintiff's Exhibit 6?

A. Well, plastic extrusion manufacturers are usually, and I believe most always, in the process

(Testimony of Eugene L. Grindle.)

of just fabricating the plastic sections and are not interested in work other than the plastic itself, and it was not—I had never thought of the idea of any plastic extrusion manufacturer being interested in the assembly as a complete unit.

Q. Who did you plan on having assemble the dipstick? [47]

A. Our shops at Pan-American.

Q. Are they qualified to do work of this type?

A. Yes, they are. They do it all the time, day in and day out.

Q. You had a drawing and you wanted to get a quotation. Then what did you do to get this quotation?

A. Well, I looked up plastic extrusion manufacturers in the San Francisco area in the phone book and made a note of the American Molding Company and went to see them. And I took a copy of this drawing and the sample dipstick with me.

Q. Which sample of dipstick are you referring to now?

A. The sample that was made by Mr. Montoya, the final sample completed.

Q. It was the same as——

A. Plaintiff's Exhibit 4, I believe.

Q. Plaintiff's Exhibit 5?

A. 5; pardon me.

Q. Did anyone accompany you on this trip?

A. Yes, another engineer who also had business

(Testimony of Eugene L. Grindle.)

in town and was also interested in plastic work for his information accompanied me into town; in fact, we went in his automobile.

Q. What was his name?

A. His name was Marshall Seagrave.

Q. What did you do when you arrived in San Francisco? [48]

A. We went directly to the American Molding Company and were received by a gentleman, I don't recall his name, but it appeared that he was the owner or manager or head man in the establishment.

He first took us on a tour of his plant, which was a rather common thing when engineers visited a plant, to take them through to show you their production methods, which was very interesting; but we came back to his office then and discussed the possibility of him producing this extrusion for us.

Q. What did you show to this gentleman?

A. I showed him a copy of the drawing and a sample model which I physically—he examined physically.

Q. Did you tell him what you were interested in?

A. Yes, I did. And I was not surprised when he said that their work was mass production or at least high production type of work. When he heard the quantity that we were interested in, only a hundred units, or 300 feet of extrusion, he said that he didn't think they would be interested for such small quantities. He says he knew a man that was looking for work, he was not doing too well at the time, and referred me to Mr. Martin Welch.

(Testimony of Eugene L. Grindle.)

Q. Did you call on Mr. Welch?

A. I did—not that very moment. Mr. Seagrave had other business in town. We went to the Braun Knecht Heiman [49] Company—I believe that is where it was—and came back to our office later in the afternoon, and I called Mr. Welch either that afternoon or the following day.

Q. Do you have any way of fixing this date as to when you made this trip to San Francisco and when you called Mr. Welch?

A. Well, I know that it was within two or three days after completing that drawing. As soon as that was completed I was ready to discuss the project with a vendor.

Q. Now you said you called on Mr. Welch.

A. So the day that I would have called Mr. Welch would have been some time in the first week of May.

Q. What did you tell Mr. Welch?

A. I told Mr. Welch that I had a plastic extrusion job that I would like him to quote on, and told him that I was with Pan-American Airways. He said that he lived down the Peninsula in Millbrae and would stop in and see me.

Q. How did you call on him?

A. I called him by telephone. Mr.—this gentleman at American Molding gave me his name and phone number.

Q. Did Mr. Welch call on you?

A. Yes, he did. I believe the day after I called him on the phone he called on me at my office.

(Testimony of Eugene L. Grindle.)

Q. This is your office at Pan-American, correct?

A. Yes. [50]

Q. What did you do when Mr. Welch called on you?

A. Well, I discussed it with him in very much the same manner that I did with this man at American Molding. I knew that Mr. Welch was a representative of Plastic Process Company in Los Angeles who made the extrusions, and I showed Mr. Welch the sample stick, the same stick that I had shown American Molding, and the copy of the drawing.

I gave him a copy of the drawing and, to my recollection, I also gave him the dipstick. It was my understanding that Mr. Welch was intending to go to Los Angeles with it and expedite the reply from his company as to whether or not they could manufacture it.

Q. Did you show Mr. Welch any of your other samples you had made?

A. Yes, I did. In a corner behind my desk in the office I had numerous samples of sticks that were evolved in this development program.

Q. What happened to those sticks?

A. The only one that I have been able to recover is that one that we introduced as Plaintiff's Exhibit 4, was it?

Q. Plaintiff's Exhibit 3.

A. Plaintiff's 3, which had somehow or other fallen behind the drafting room files which had not

(Testimony of Eugene L. Grindle.)

been moved in years, were just recently moved, and they found this stick behind the files. All the others had been lost in the shuffle [51] somewhere.

Q. Could you relate what Mr. Welch said to you at this conference?

A. Mr. Welch said that he would get a reply from his company as soon as possible.

Q. And I assume he left Pan-American, is that correct?

A. Yes, he did.

Q. What did he have with him as far as you can remember?

A. I know he had the drawing, and to my recollection he took the dipstick. There seems to be some question about that particular point, however.

Q. When did you hear from Mr. Welch again?

A. I don't recall exactly; I believe it was about a week.

Q. And how did you hear from him?

A. Well, he came into my office one day and said that he had received a reply from his company, and some plastic extrusion.

Q. Did he call you by phone first?

A. I don't believe so. I believe he just walked into my office.

Q. And what did he have with him?

A. He had a piece of square sixteenth inch well plastic tubing and two pieces of quarter inch outside diameter round tubing, all three pieces in approximately three foot lengths.

Q. What did Mr. Welch say to you? [52]

(Testimony of Eugene L. Grindle.)

A. Mr. Welch said that this company had studied my extrusion and said that it would be costly to produce, and in the manner of many companies on this thing, they offered standard materials that they had in stock as a possible substitute and asked if we could use those.

Q. Is this an example of the extrusions Mr. Welch brought in to you?

A. Yes, this is an example of what Mr. Welch brought in.

Q. Were the tubes separate from the square extrusion?

A. Yes, they were. I don't recall exactly whether they were laying inside the tube or whether he handed them to me separately. I know that they were undoubtedly pulled right out if they were inside and examined by me.

Q. Were the tubes held in place within the tube?

A. No, they were not.

Mr. Naylor: Mr. Hohbach, it isn't represented that these were the actual tubes?

The Witness: No.

Mr. Hohbach: No, it is not. They are just examples. I would like to offer these in evidence as Plaintiff's Exhibit 7. I would suggest that they be marked 7-A, B and C. There are three pieces.

The Court: All right.

The Clerk: Plaintiff's Exhibits 7-A, B and C.

(Tubes marked Plaintiff's Exhibits 7-A, 7-B and [53] 7-C. respectively, in evidence.)

(Testimony of Eugene L. Grindle.)

Q. (By Mr. Hohbach): Were the pieces that Mr. Welch gave you of this same length?

A. Approximately, three feet long.

Q. How long were your dipsticks going to be?

A. Three feet. My sample that I had produced was three feet long, which was the length required to accommodate the deepest tank in the airplane.

Q. Had you seen round tubes like this before?

A. Yes, I have. It was tubes very similar to that that I drew out of stock—we carried them in stock for years—to determine what size tubing could be used to support this fluid column by finger vacuuation.

Q. Had you seen square extrusions before?

A. We have used square extrusions in metal tubes. I hadn't seen square extrusions of those exact dimensions in plastic before.

Q. Where did you acquire the three-quarter inch extrusion that is shown in Plaintiff's Exhibit 3?

A. That was purchased from the Rohm & Haas Company in San Francisco, manufacturers of lucite products.

Q. What did you do with these standard extrusions that Mr. Welch had given you?

A. I then took them to our drafting supervisor, Mr. Ray Chong, and gave him sketches of how I wanted the wooden filler cut out and how I wanted the plastic—or the paper [54] calibrations cemented on there, and also the calibration that I had acquired from our calibration tests and showed him how the calibration had to be laid out on the stick.

(Testimony of Eugene L. Grindle.)

Q. Did Mr. Welch inform you how these standard extrusions were to be used?

A. No, he did not. I wouldn't conceive that that would be possible. My only contact with Mr. Welch was for the purpose of supplying plastic extrusion at that time.

Q. You took these back to the drafting department. Who did you give the extrusions to?

A. To the drafting supervisor, Mr. Chong.

Q. And what did he do?

A. Well, he immediately accepted the sketches and made a—put it on his project list. He had a considerable amount of work in the drafting room at the time, as I recall, and he didn't get at this job immediately. It was a matter of about ten days or so before he had actually completed the drawing on it.

Q. Do you remember what was shown on the drawing?

A. The drawing showed this particular tubing, this square and two round pieces of tubing section, which was a complete assembly of a dipstick, showing a wooden filler specially milled out to accommodate the round tubes, dimensioned to show—to correlate the dimensions of the wooden filler with the paper calibration that had to go on there, which [55] was a very important part of the drawing. The actual complete assembly had to be laid out in very accurate detail to determine the actual dimensions of the wooden filler, because it had to

(Testimony of Eugene L. Grindle.)

accommodate this paper on there so that the calibrations would appear in the proper place.

Mr. Hohbach: Your Honor, I will introduce this drawing in evidence at a later time.

Q. Is it customary to make drawings of this type?

A. Yes, it is. Any item that is to go to an outside vendor to our design, we make a drawing of it.

Mr. Naylor: Your Honor, I wonder if we could have that drawing marked at this time so that it would fit into the sequence of this particular series of events? There are several drawings, and I think it might be confusing if it isn't tied in.

Mr. Hohbach: All right.

The Witness: May I stand up here?

Q. (By Mr. Hohbach): Is this a copy of the drawing that was prepared by Mr. Chong?

A. Yes, it is.

The Court: Is this a copy of what you have in your hand?

A. Yes, the same.

Mr. Hohbach: Yes, it is, Your Honor.

Q. (By Mr. Hohbach): What number does the drawing bear?

A. The drawing bears number D-32.061.114. [56]

The Court: I think before we get into the explanation of this drawing we will take the noon recess. Would it be convenient for you gentlemen to return at 1:30?

Mr. Naylor: Yes, indeed.

Mr. Hohbach: Yes, Your Honor.

The Court: We will recess now until 1:30.

(Testimony of Eugene L. Grindle.)

(Whereupon an adjournment was taken until 1:30 o'clock p.m. same day.) [57]

Wednesday, February 8, 1956, 1:30 P.M.

The Court: Proceed.

Q. (By Mr. Hohbach): Mr. Grindle, just before lunch I gave you a copy of the drawing. Could you identify the drawing?

A. Yes, this is a drawing made by Mr. Ray Chong showing myself as designer, signed by myself and the engineering superintendent of Pan American.

Q. When did Mr. Chong sign the drawing?

A. Mr. Chong didn't actually sign it by signature, but he indicated his name as the draftsman on June 4, 1948.

Q. When did you sign the drawing?

A. I signed the drawing on June 7, 1948, as well as my superiors.

Q. Could you describe briefly what is shown in the drawing?

A. Well, the drawing is a detailed drawing of a complete fuel tank dipstick calling for this square plastic tubing with two pieces of wound tubing for the fluid column in opposite corners, incorporating a wooden filler cut out to a very definite shape to accommodate the round tubes and upon which is cemented a paper graduation. The ends—on the drawing in its present state, it calls for the ends being sealed by filling them with cement to a depth of

(Testimony of Eugene L. Grindle.)

three-sixteenths of an inch. That particular part of the drawing was incorporated on 9/1/48. [58]

Q. Will you point out where you see that change was made?

A. Yes, up in the righthand corner, Your Honor. The procedure was, when you made a change to a drawing which had been released, it required a change letter telling what the change was and calling out on the body of the drawing what it was that was changed. In this particular case this A-1 change shows a dash-12 block was deleted, removed, and in the place of it the end was filled with cement.

Mr. Hohbach: I would like to offer this in evidence as Plaintiff's exhibit next.

The Court: Let it be received and marked.

The Clerk: Exhibit 8.

(Whereupon blueprint referred to was received in evidence and marked Plaintiff's Exhibit No. 8.)

The Witness: I would like to say that when our dipsticks were first ordered in accordance with that drawing, the drawing called for that dash-12 solid block in the end, three-sixteenths of an inch thick.

Q. (By Mr. Hohbach): Does the drawing show a graduation chart?

A. Yes, it does in detail.

Q. Going back to your first conference with Mr. Welch, did you give him a copy of Plaintiff's 6—that's drawing A-14.123.116?

A. Yes, I did. That is the extrusion drawing. [59]

(Testimony of Eugene L. Grindle.)

Q. Yes. A. Yes.

Q. Did you specify any critical size for the extrusion?

A. Yes, I did. The sizes of the tubing extruded, the extruded tubing was to be no more than three-quarters of an inch square. As a matter of fact, it also required rounded corners.

Q. Is that shown on the drawing?

A. Yes, it is. This particular drawing is drawn twice size, it shows dimensionwise that it is three-quarters of an inch square, and it has an eighth inch radius in the corners. The reason for that was that our fuel tanks on these airplanes on which this stick was to be used had a screen with a trapdoor in the bottom, which wouldn't accommodate a stick any larger than that embodied in this drawing.

Q. What dimension did the standard extrusion, the standard square extrusion that Mr. Welch returned to you have?

A. It had very much the identical dimensions of that one.

Q. Going back to your second conference with Mr. Welch, in which he brought in to you those standard extrusions, Plaintiff's Exhibits 7-A, B and C, did he give you a quotation at that time on supplying those extrusions?

A. No, he didn't. My contact with Mr. Welch up to that time or my request of Mr. Welch had been for him to furnish quotations on plastic extrusions. At the time he delivered [60] the extrusion, he did not deliver a price quotation.

(Testimony of Eugene L. Grindle.)

Q. After Mr. Chong had completed the drawing D-32.061.114, which is Plaintiff's Exhibit 8, what did you do?

A. Would you repeat that?

Q. After Mr. Chong had completed this drawing, this Plaintiff's Exhibit 8, what did you do?

A. Well, actually prior to completing the drawing, which was some week or ten days or possibly two weeks after Mr. Welch had brought in the extrusion, some time in the interim before the drawing was completed, Mr. Welch came to me and asked if he could quote on the entire assembly of the dipstick. And I said I didn't see any reason why not. He could quote both ways and that if he wanted to build the entire dipstick I would get him an advance copy of the drawing and he could make up the sample, a sample which I had previously intended that we make in our shop, in order to test the stick to see if it would be acceptable.

Mr. Welch therefore received the copy of this advance drawing. I myself took it down to our print shop at Pan American and had them run off an Ozalid print from it, which I gave to Mr. Welch so that he could assemble a complete model in accordance with this drawing. And at the same time I had Mr. Welch or Mr. Chong—pardon me; our draftsman—draw up a full-scale calibration chart, which I also had printed and gave to Mr. Welch so he could incorporate it in his initial [61] sample. Those were given to Mr. Welch at some time prior, possibly a

(Testimony of Eugene L. Grindle.)

day or two prior, to the date on the drawing because it was an advance copy.

Q. Can you fix the date when this took place? Possibly you can refer to the drawing.

A. Well, the drawing is dated by Mr. Chong on June 4, 1948. The copy that Mr. Welch received was probably on that day or a day or two prior to that, because the drawing was just about completed on the 4th.

Q. What do you mean by if you made an advance copy? What was the original drawing? On what was that made?

A. Well, the original drawing was substantially the same as it is in its present form except that the ends were sealed more in accordance with the sample that I had originally built in our shop. It only contained a thin layer of plastic in the end to act as a seal, and the original drawing in that form for Mr. Welch to make a sample, in that drawing the ends were only sealed with a very thin layer of plastic.

Q. What I meant is, was the original drawing made on tracing paper or some other material?

A. The original drawing was made on tracing film, yes.

Q. And you took that tracing film and had a copy made for Mr. Welch?

A. I did that personally, yes. [62]

Q. And at the same time gave him scales which were to be incorporated in the sample, is that correct?

A. Yes, I did. They were also printed on Ozalid.

(Testimony of Eugene L. Grindle.)

Q. What do you mean by Ozalid?

A. Well, Ozalid is this paper right here. It is just a form of blueprinting. The difference between this and blue printing is that it is a white background with dark lettering on it and so on. It is called an Ozalid machine that they run it on.

The Court: How is that spelled?

The Witness: It is spelled O-z-a-l-i-d. It is a process used by almost all companies now to reproduce drawings.

Q. (By Mr. Hohbach): You made a drawing of this dipstick. Can you tell us when Pan American normally makes drawings of parts?

A. Yes, the only time that Pan American makes drawings is when they are drawing something to their design or possibly taking some vendor's component, a motor or whatever you may have on an airplane, and redesigning something on it. There has never been any occasion, to my knowledge—I believe this can be corroborated by anyone at Pan American—where Pan American had ever made a drawing covering an item of a vendor which they were already producing or had designed themselves. There would be no occasion for Pan American to make drawings embodying some outside vendor's product. [63]

Q. What was done with the standard extrusions that Mr. Welch had given you?

A. The extrusions that Mr. Welch gave me, which I turned over to Mr. Chong to make a drawing from, were returned to Mr. Welch with

(Testimony of Eugene L. Grindle.)

the advance copy of the drawing; my understanding was he was going to use them to make up his initial sample.

Q. Did Mr. Welch make up a sample dipstick?

A. Yes, he did.

Q. When did you find out that he made up the sample dipstick?

A. Mr. Welch returned a few days after we had given this advance drawing to him with a complete assembled dipstick for us to test, and at the same time he gave us a quotation based on the sample he delivered.

Q. What did Mr. Welch state at the time he delivered the sample?

A. Well, as far as relates to the sample itself you mean?

Q. Yes.

A. Well, he said that his interest now was primarily in furnishing us a completely assembled dipstick. He went into some great detail to explain to me that his connection with Plastics Process Company was that he was merely a San Francisco representative for the company, on a very small retainer—he mentioned to me \$50 a month—and that he was not doing [64] but very little plastic business and was in very dire financial straits. He said he would like very much if we could give him the job in its entirety, so he could make a few dollars.

Q. When did this first come to your attention, that he wanted to supply a complete dipstick?

A. Well, some time after he brought in the original plastic samples from his Los Angeles factory,

(Testimony of Eugene L. Grindle.)

he approached me from the standpoint of making the entire assembly.

Q. And this is contrary to your original plan, is that correct?

A. That was the first idea that I had ever entertained of anything other than assembling the sticks in our own shops.

Q. Can you describe the sample dipstick that was given to you by Mr. Welch?

A. The sample that Mr. Welch submitted for testing was made of a wooden filler, milled out to accommodate the round tubes. It had cemented on it an Ozalid print of the DC-4 airplane calibration and the ends were sealed with a thin plastic plug.

Q. Where did he get the scale for the sample dipstick?

A. It was the scale that I had given him.

Q. What did you do with the sample dipstick submitted by Mr. Welch?

A. Well, now, this sample dipstick was to the point now [65] where I had an item that could be shown to the people that were going to use the dipstick. Prior to this time none of these designs that I had experimented with or developed were officially submitted for approval because I hadn't been satisfied with them, for some reason or another, myself. But now we had a stick that we were ready to test to see if they would be acceptable for purchase. So I called in a man, Mr. Harold Schmidt——

Q. Before you go on with this, is this an example

(Testimony of Eugene L. Grindle.)

of the dipstick that was submitted to you by Mr. Welch?

A. Yes, this is an exact replica of what Mr. Welch submitted. That particular one was tested to destruction, so this is a replica that I built myself.

Q. How did you make up the scale?

A. I made up the scales in exactly the same manner that I had when I gave it to Mr. Welch. It is printed on an Ozalid scale. I drew it myself.

Q. All right. Go on with your story as to what happened when the sample was submitted to you.

A. All right. As soon as I received the sample, I told Mr. Welch that we would test it and let him know what our decision would be. And I called in Mr. Harold Schmidt whose position was essentially the same as mine is at the present time—who was technical assistant to the chief flight engineer. It was he who initiated the request for a new dipstick design. [66] So he was called in to participate in a test to see if it would satisfy our needs.

Now, he came over to our hangar——

Mr. Naylor: Pardon the interruption, if the Court please. I wonder if we could fix the time on this particular test because we have sort of lost track of what time we are talking about.

Q. (By Mr. Hohbach): Can you give us the approximate date as to when this test took place?

A. Now, I believe that test took place around the 5th, 6th, 7th of June—somewhere in that time.

Q. How do you fix it relative to plaintiff's exhibit 8? That is the last drawing we had offered in evidence.

(Testimony of Eugene L. Grindle.)

A. Well, I fix it as prior to June 7th, because the final acceptance of that drawing incorporated certain changes that were made as a result of our destruction tests.

Q. After Mr. Schmidt came over to witness the test, what did you do?

A. Well, we had already satisfied ourselves that the stick functionally would do the job—you could stick it in a tank and draw fluid out and read the level very accurately. But we were still questioning the ability of this stick to stand the day in and day out use and abuse that some of our mechanics might subject it to. Our wooden sticks had often been thrown off the wing, been run over by trucks and scratched [67] and damaged considerably so we wanted to rather subject this stick to the type of use it would be given in operation.

Q. Could you describe that test for us?

A. Well, we thought that we would give it as severe a test as we could reasonably expect it to withstand and our offices in the hangar were located up above the general hangar floor, the walkway up there was about fifteen feet above the hangar floor and fairly well simulated the height of an airplane wing. So we decided to throw the dipstick from the hangar deck down to the floor and against engine stands or what may be down there just to see how it would hold up. And after several throws we were already quite satisfied that it was a very sturdy, durable stick. But we kept throwing it and made a definite attempt to strike it on the end, which we suspected

(Testimony of Eugene L. Grindle.)

would be the weakest part of the stick. On the ninth time that we threw it, it split the end of the stick. So Mr. Schmidt and myself examined the failure of the stick and saw that the wooden filler in it, because we hit it on the end—so much inertia was developed in this wooden filler that it shifted in the stick and tried to punch this end plug out. It also cracked the square tubing up a couple of inches on the side of the tube. So it didn't appear that the plug was thick enough or had enough bonding area there to withstand the shock. And it seemed a very simple matter to correct that. So I told Mr. Schmidt that I would beef up the end of [68] the stick, and that we would order them.

Q. Well, before you go on can you tell us how the end of this stick is constructed?

A. Yes, this stick is—I would like to expose this drawing again.

Mr. Hohbach: The plaintiff is referring to Plaintiff's Exhibit 8.

A. (Continuing): This stick is constructed in exact accordance with this drawing with the exception of the way the end is sealed. There is a little plastic end plug here, made the exact shape of the wooden filler, and after the wood is pushed in there, it is recessible, with plastic about one-sixteenth of an inch, and then this end plate is put in there and cemented in place.

Q. Can you tell us how thick that end plug is?

A. Well, the end plug on here is about a sixteenth of an inch thick. If I had a knife or something,

(Testimony of Eugene L. Grindle.)

I could scrape that off and you could see it. Mr. Welch, I believe at my suggestion, has always painted over the ends of these sticks here. As a matter of fact, for years we furnished him the blue paint. It is Pan American blue that was used on all his sticks. That was just to cover this end. I will throw this on the floor. There, Your Honor can see that the end plate in this stick is very thin (indicating).

Q. Now, you stated that you constructed this yourself; is [69] that correct?

A. Yes, I did.

Q. And as far as you remember, this stick is constructed exactly the same way that the original sample submitted to you by Mr. Welch was?

A. Yes, it is, and I am sure Mr. Schmidt can corroborate that.

Mr. Hohbach: Your Honor, I would like to offer this in evidence.

Mr. Naylor: Before you do, would you fix the time when Mr. Grindle made this particular sample?

The Witness: It was made in the last couple of weeks, since I heard that the case was set for trial. We decided, because the other one had been destroyed, it would be good to produce a replica.

Mr. Hohbach: Your Honor, I would like to offer this in evidence as an example of the stick submitted to Mr. Grindle by Mr. Welch, as Plaintiff's Exhibit 9—it would be.

The Witness: I would like to say here that this stick, although constructed recently, was not con-

(Testimony of Eugene L. Grindle.)

structed from my memory but from the drawing which is very clear except for that end piece which I remembered very distinctly as being very thin.

Mr. Naylor: And which drawing are we now talking about, Mr. Grindle? [70]

The Court: Exhibit 8.

Mr. Naylor: Exhibit 8.

The Witness: That is correct.

The Court: Let it be received in evidence.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(Whereupon replica of dipstick referred to above was received in evidence and marked Plaintiff's Exhibit No. 9.)

Q. (By Mr. Hohbach): You stated that you found that the end failed in this dipstick submitted by Mr. Welch? A. That's right.

Q. What did you do after that?

A. Well, the solution seemed very simple to me, and that was to increase the thickness of that end plug to get more adhesion strength from the plug so that it could resist the impact of this wooden filler against it. So I increased the thing to three-sixteenths of an inch thick, which would give you 300 per cent of the bond strength that you had with the one-sixteenth inch piece.

Q. Is that shown on your drawing, Plaintiff's Exhibit 8?

A. Well, that block actually—I will look at this drawing. That block actually was called for here.

(Testimony of Eugene L. Grindle.)

and the dimension was shown there as three-sixteenths of an inch, but it was removed by this dash-12. It was the dash-12 block. It was removed by this A change. [71]

Q. Is it shown in the bill of material?

A. It is shown on the bill of material, but it shows it as scratched out and deleted for this A change.

Q. Was that block in the drawing that you originally submitted to Mr. Welch?

A. The advance copy you mean?

Q. Right.

A. There was an end plate in there, but it was not three-sixteenths of an inch thick. It was only a thin plate, either a thirty-second or a sixteenth of an inch thick. Do you want me to explain how we made that A change at this time?

Q. Who made this A change on the drawing that you have been referring to?

A. Well, the actual A change was made by a draftsman, Bill Peterson. He himself is no longer with Pan American, but his work was under the supervision of Mr. Chong.

Q. Why did you think the use of a thicker block would help in construction of the dipstick?

A. Well, primarily to give you additional adhesive area between the end plate and the square and round tubing, so that you would have a greater area of cement.

Q. Why did you need this greater area?

A. Well, that was where the stick failed. The

(Testimony of Eugene L. Grindle.)

stick that we had tested to destruction. That turned out to be [72] the weakest point, and I decided to beef it up just so it would be a little stronger.

Q. Why did you think it failed at that point? What caused it to fail?

A. Because we had thrown a stick down and it had hit the end of the stick, and this wooden filler with the paper calibration is loose inside the tubing and when it hit on the end of the tubing, the wooden filler shifted in it and tended to push out the end plug.

Q. You stated you recommended the placement of a block in the ends. How would you make such a block?

A. Well, a block like that could be made in numerous ways. It could be extruded, it could be machined out of square plastic, it could be molded, could be laminated out of thinner pieces built up and cemented together to form a thicker block.

Q. What would be the easiest way to make such a block?

A. It would depend entirely on the quantity of production that we were going to get into. If it were going to be a mass production item, I would think that a molded block would probably be the cheapest in the long run. For a limited production, if it was concerning this item, the cheapest way to produce a block would be to laminate it out of thinner pieces, which you could stamp with a very cheap die.

(Testimony of Eugene L. Grindle.)

Q. Is lamination used in the aircraft industry extensively? [73]

A. It is very common practice and has been for many years.

Q. Could you give us some examples?

A. Well, there are numerous things in aircraft as well as other fields. Laminated plastics in aircraft are such things as windows, tabletops, mirrors, murals and things that we put on the wall. Plastics were developed, many plastics and plastic applications were developed by the aircraft industry because they couldn't use glass in an airplane because of the fact it would shatter and to vibration and impact, and it had to have safety glass. Now, safety glass in automobiles is made up of laminated sections with a plastic laminate in between glass pieces in order to give it additional strength and prevent it from shattering.

Plywood that is sold and used by householders all over the world is made up of laminated sections.

Q. If you asked a mechanic to build you up, to make you a block and he didn't have the material of that thickness, how would he make up the block?

A. Well, undoubtedly any mechanic——

Mr. Naylor: Excuse me. I would like to inquire as to the pertinency of this line of examination to the issues of this lawsuit, if I may, please. It seems to me that we are wandering far afield and we are now hearing Mr. Grindle give an exposition of the practices of lamination, and I don't know that he has been qualified as a plastic expert, [74] nor do I

(Testimony of Eugene L. Grindle.)

see any degree of pertinency to the issues of this particular controversy.

Mr. Hohbach: Well, Your Honor, the pertinency in relation to Claims 2 and 3 of the patent, if your Honor has had an opportunity to read those claims—you will see that it calls for laminated end plugs and we are just filling up and showing here that lamination is a word in the art, and that any ordinary mechanic would do the same thing.

The Court: I will allow the question.

Mr. Hohbach: Pardon?

The Court: I will allow the question.

Q. (By Mr. Hohbach): Mr. Grindle, have you had any experience with plastics?

A. Yes, I have. I have worked with plastics myself. I am not a mechanic, but I enjoy working with things. I have made plastic objects. I have made my own drafting triangles and things from plastic. I am at the present manufacturing a product which is made of plastic. I mean, it has a plastic case which I make myself.

Q. Approximately when was this block that is called for in the drawing entered on the drawing?

A. It was entered on the drawing immediately subsequent to our destruction tests of this sample stick, and that would be probably on the date of June 7th, the date that I signed the drawing as being complete and a final drawing. [75]

Q. When was the use of the block deleted?

A. Well, the use of the block was deleted, the

(Testimony of Eugene L. Grindle.)

actual date that it was deleted from the drawing was 9/1/48. But——

Q. Do you know why it was deleted?

A. Yes, when Mr. Welch delivered his first order of dipsticks to Pan American they were not built in accordance with this drawing because of that very feature. He did not incorporate this three-sixteenths of an inch block. Instead of the block, he filled the end with cement and let it harden into a block. Now, functionally the stick did the same thing and it was acceptable from a functional standpoint. So we accepted the sticks in that manner, even though they didn't incorporate the block. There were some sticks out of the first shipment that he made that we rejected because the calibration was not inserted in the stick within the tolerances that we required on our drawing. But the fact that the end plugs were not put in there, we accepted, because the stick was functional.

Q. When did——

A. Pardon me. Because the stick was not made in accordance with the drawing, I verbally approved accepting them, but the verbal approval had to be authorized by a drawing change, so that the sticks would be received per the purchase order.

Q. Did Mr. Welch ever submit a quotation to you? [76]

A. Yes, Mr. Welch submitted a quotation at the time he delivered the sample for testing.

Q. Is this a copy—is this the original of that quotation?

(Testimony of Eugene L. Grindle.)

A. Yes, this is. It is a quotation dated June 7, 1948.

Q. Can you state what appears on the quotation?

A. Yes, it says, "We quote you as follows: 300 dipsticks complete per sample submitted but with printed scale." I would like to say that that indicates the sample was complete, but the scale was this Ozalid copy. And he goes on—

Q. What sample is he referring to there?

A. He is referring to a sample that he submitted to us for destruction tests.

Q. That's Plaintiff's Exhibit 9?

A. Correct. Now this quotation also says, "While our quotation is based on 300 units, we can assure you that 100 units will be furnished you for the same price or less."

Now, Mr. Welch had repeatedly asked me if we could give him a larger order, and a hundred units was all that I could justify. And even to this date he was trying to get a large order, but we couldn't do it. But he did say that the quotation would apply to a hundred quantity also. It was approximately this time that he first indicated to me his situation with Plastic Processes and he wanted purchase orders made out to his office instead of made to Los Angeles and so forth. [77]

Mr. Hohbach: I offer this in evidence as Plaintiff's Exhibit 10. I know that it bears the identification Plaintiff's Exhibit 10. I know that it bears the identification Plaintiff's Exhibit 10 for identification.

(Testimony of Eugene L. Grindle.)

The Court: What was that? Some pretrial?

Mr. Hohbach: This was in a deposition that was taken where it previously carried that number.

The Court: Oh. Exhibit 10.

Mr. Hohbach: Now Exhibit 10.

(Whereupon copy of quotation dated 6/7/48 referred to above was received in evidence and marked Plaintiff's Exhibit No. 10.)

Q. (By Mr. Hohbach): Did Mr. Welch ask you for a release to sell to other airlines?

A. Yes, he did. About the time that he quoted on this initial order of ours, I believe it was probably a day or two after he had given us this quotation, because the quotation was delivered approximately the time or a day or two later that he submitted the sample. But just a day or two after he submitted this quotation he came to me and he said—he asked if I thought there would be any use with this dipstick with other airline operators and I told him that practically all operators, including the Air Force, used a fuel tank dipstick. I believed this was quite an improvement over anything in use at the time and that he should be able to sell them to other people. And he says, well, would Pan [78] American give me permission, would you write me a letter granting me permission to sell these to other airlines and give me a testimonial of some kind that will show how much better this is so I can use it to sell fuel tank dipsticks? He says, "If you will let me sell them to other people," he said, "I will

(Testimony of Eugene L. Grindle.)

"give you a price consideration. I will sell them to you for \$3.00." I told Mr. Welch that I would consult with my superiors to see if that would be acceptable to them.

I then went to my immediate superior and told him the story. He had been familiar with the project anyhow. He went down to Mr. Connor, the assistant maintenance manager, and asked him if he could write such a letter. He returned to me and he said that it would be all right to give Mr. Welch that permission and instructed me to draft such a letter.

Q. Before you go on to that, could I ask you, after you received this requisition—I mean this quotation from Mr. Welch, what did you do?

A. After I received the quotation?

Q. Right.

A. Well, by the time I had received the quotation we had completed our destruction tests on the sample that he submitted and I had already initiated the change to the drawing to add this thicker block in the end. That was a deviation from the way he quoted on it. We were making a change from what he had quoted on, so because of that I voluntarily offered to [79] increase his quotation by 25 cents to cover this modification that we had made.

Q. Did you issue a requisition?

A. I initiated a requisition, yes.

Q. Was that an advance to purchase order by Pan American?

A. Yes, the procedure there is that the requisition be initiated by myself, in this case, or any engineer

(Testimony of Eugene L. Grindle.)

designing something like that, which would go to the supply department and they would write the actual purchase order.

Q. Did you tell Mr. Welch that you were going to give him a requisition or purchase order?

A. Yes, I did verbally, and at the time that I had received permission from my superiors to grant him permission to sell it to other people I wrote him a letter.

Q. Is this a copy of the purchase order given by Pan American to Mr. Welch?

A. Yes, this is a purchase order, No. 30-017541, dated June 21, 1948, for 100 dipsticks at the price of \$3.25 each. And it is confirming to Mr. Welch delivery within one month. It says that "Enclosed is one blueprint No. 32.061.114."

Q. That is referring to Plaintiff's Exhibit 8, is that correct?

A. That is correct.

Q. Did you identify the part number of the dipstick on the purchase order? [80]

A. The part number of the dipstick on the purchase order as is on all parts manufactured to Pan American design, a Pan American part number which is exactly the same as the drawing number.

Q. When did Mr. Welch promise to deliver the dipsticks?

A. Promised to deliver them within one month of our purchase order and——

Q. You say that on the purchase order, is that correct?

(Testimony of Eugene L. Grindle.)

A. Yes, the purchase order says, "Conforming to Mr. Welch," which seems that he had agreed to do that.

Mr. Hohbach: I offer this in evidence as Plaintiff's Exhibit 11.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11 in evidence.

(Whereupon purchased order referred to above was received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Hohbach): You stated that you had gone to see your supervisors about giving a release to Mr. Welch. What did your supervisor say?

A. Well, my supervisor said that it was a rather unusual request, but after thinking about it it seemed in order that we were going to get a price consideration for this letter and that that would be an advantage to Pan American; so he agreed to it. [81]

Mr. Naylor: If the Court please, this is purely hearsay at this point. I mean, after all, we are talking about what the supervisor said, and I assume that they are seeking some variation of the written document that eventually came to Mr. Welch.

Mr. Hohbach: I will strike that question. Probably leading anyway.

Q. What is your understanding as to the conversation you had with your superior, the supervisor?

A. Well, my understanding of that conversation was that I was pursuing a specific request by Mr.

(Testimony of Eugene L. Grindle.)

Welch to write a letter to him which he could use to sell to other airlines, and which would give him permission to sell dipsticks to other airlines; and it was my understanding of that conversation that because of their knowledge of the project and the advantage that it would be to Pan American to get a price consideration they would grant this letter.

Q. Did you write a letter, then?

A. Yes, I did. I wrote a letter, I believe it was dated June 10th.

Q. Is this the copy of the letter?

A. Yes, this particular one I have is our actual official file copy of that letter.

Q. Who wrote the letter?

A. I wrote the letter myself. [82]

Q. How can you tell that?

A. Well, on the second page, Your Honor, it is the policy on all letters written by an individual that the individual's initials appear in the lower left-hand corner.

Q. What are your initials?

A. My initials are E.L.G.

Mr. Naylor: Mr. Hohbach, would you like to introduce the original of that letter?

Q. (By Mr. Hohbach): Is this the original of that letter, Mr. Grindle? A. Yes, it is.

Q. Does it conform with the copy which I just gave you?

A. It does except in one minor detail and that is that our office copy showed certain blind distri-

(Testimony of Eugene L. Grindle.)

bution that was not on the letter to Mr. Welch. There are copies here that went to our other divisions with a special note to these blind carbon copies saying that, "We will send each of you one of the production dipsticks for your comment and possible use on or adaptation to your aircraft. The sticks will cost approximately \$3.00 each." And that was to indicate that the price that we would be paying for these sticks would be \$3.00.

Q. What did you generally state in the letter?

A. Well, generally I said here that, transmitted with this letter because it was in advance of our actual purchase [83] order, would be copies of our drawings, the final and official drawing, and that our purchase orders would be issued for 100 units based on his June 6th, 1948, quotation. I said, "However, we have altered the design of these sticks from the original sample to incorporate solid plastic blocks in each end for additional strength. We are assuming that this change will not increase the cost by more than 25 cents per unit. Please advise if any further price adjustment will be necessary."

Q. Was that price increase that you were speaking of shown on the purchase order? ..

A. Yes, it was; it was accepted by Mr. Welch.

Q. Will you go on?

A. I said that "the graduation chart, the original from which you should make the printed reproduction, is being sent to you under separate cover to avoid damage in mailing."

This was a drawing of the actual calibration which

(Testimony of Eugene L. Grindle.)

would now have to be photographically reproduced, so it had to be handled very carefully and couldn't risk being damaged in the mail. Then I went on in this letter to explain why the dipstick was developed and some of the characteristics and features of the dipstick, and the fact that it should be received by other airlines. And in my last paragraph I said, "This letter will constitute release of the design to you to market as you see fit." The sole intention of that last [84] paragraph was to authorize him to sell the dipstick and no other.

Mr. Naylor: I move that last may go out, Your Honor. That is——

The Court: That is a volunteer statement; let it go out. The letter speaks for it.

Q. (By Mr. Hohbach): Who signed the letter?

A. The letter was signed by Mr. J. D. Connor for Mr. J. Weesner.

Q. How come Mr. Connor signed it?

A. Mr. Connor was assistant maintenance manager, assistant to Mr. Weesner and was authorized to sign for him.

Mr. Hohbach: I offer these in evidence as Plaintiff's Exhibits 12 and 13.

The Court: Let them be received.

The Clerk: Plaintiff's Exhibits 12 and 13.

Mr. Naylor: Which is which?

Mr. Hohbach: The original should be 12 and the Pan American copy should be 13.

Mr. Naylor: Thank you.

(Testimony of Eugene L. Grindle.)

(Whereupon original letter and copy thereof referred to above were received in evidence and marked Plaintiff's Exhibits Nos. 12 and 13, respectively.)

Q. (By Mr. Hohbach): You read the last paragraph of that letter. Did you discuss that with your supervisors? [85]

A. Yes, I did.

Q. What was your understanding—Strike that. Did you tell your supervisor what Mr. Welch had asked you?

A. Yes, I did.

Q. What did you tell them?

A. I told them that Mr. Welch would like to sell these dipsticks to other users and asked for our permission, for which we were to receive a price consideration.

Q. It was clear in your mind that Mr. Welch was to give Pan American a price consideration; is that correct?

A. Absolutely correct.

Q. Did you tell that to your supervisors?

A. Yes, I did.

Q. Did they give you authority to—Did they give you permission to write this letter?

A. Yes, they did.

Q. What did Pan American intend to convey by the last paragraph of this letter?

Mr. Naylor: Now, again, I think we are trying

(Testimony of Eugene L. Grindle.)

to vary or explain language which speaks for itself,
Your Honor.

The Court: I think the letter speaks for itself; objection sustained.

Mr. Hohbach: Your Honor, I would like to point out that the witness had testified that the release was given for [86] a price consideration and that is not shown in the letter, as you will note.

Q. (By Mr. Hohbach): Mr. Grindle, could you tell us why you didn't put this price consideration in the letter?

A. Yes, I can. There was a very definite reason for not putting it in here. Mr. Welch solicited this letter for the purpose of showing it to prospective customers and whether he asked me specifically not to mention the price consideration or not, I don't recall; but it would be obvious that it wouldn't be much use to him to show to other customers if he was selling it to Pan American cheaper. But that is the purpose of—that's what he told me he wanted the letter for.

Mr. Hohbach: May I ask what the witness intended to convey by this letter or what Pan American intended to convey?

The Court: Well, I will say that the letter was self-explanatory. Now, the answer to the last question which you asked, I think, clarifies the situation. It would be obvious that if Mr. Welch was going to sell it to other prospective users, he wouldn't want anything in there about a reduced price. That is perfectly understandable and conceivable, isn't it?

(Testimony of Eugene L. Grindle.)

Mr. Hohbach: That's right, Your Honor. However, there is some dispute as to the breadth of the terms—"This will constitute a release to you to market as you see fit." [87] I am just trying to get his interpretation as to what he meant by it.

The Court: Well, all right; I will allow that.

Q. (By Mr. Hohbach): What did you intend to give to Mr. Welch by this last paragraph of the letter?

A. Well, exactly what he requested.

Mr. Naylor: Your Honor, if he is going to try to water it down and qualify it by language that is not there, I think it is objectionable.

The Court: Well, you may be technically correct, depending upon the character of his answer. I will try to separate the wheat from the chaff.

Mr. Naylor: Thank you, Your Honor. I don't want to be sitting by silently while it goes in.

The Court: I understand.

A. Well, I had a rather clear understanding of what Mr. Welch wanted and I tried to convey that in this letter. That was merely to give him Pan American's permission to sell this dipstick to other users. I had no intention of dealing or conveying any possible rights that I may have myself. I was acting purely in the capacity of an employee for Pan American Airways.

The Court: When you developed this particular dipstick, did you have any independent arrangement with Pan American outside of your employment, or did you— [88]

(Testimony of Eugene L. Grindle.)

The Witness: Yes, Your Honor, I have been a design engineer for approximately 19 years now in the aircraft field. With all the companies I worked with before—North American, Curtiss-Wright and Lockheed, I had a contract, a written employment contract with them that all designs of mine would be the property of my employer. Pan American as an airline is not a manufacturer; they have practically no interest in patents or production items themselves. They do occasionally desire to patent items that may be developed by an employee which would be in the realm of competition at the passenger level, such things as passenger comfort items, features, special features on seats and things that the public is exposed to. They have patented them. Now, technical developments—and there have been many by engineers of Pan American—the company looks at such developments and if they choose to patent them, they will. But if they do not, the individual in many cases, and practically all cases of technical developments, has been given that permission to patent himself, with the company retaining what they call “shop rights” which would give them permission to build it themselves.

The Court: Did you have such permission in this instance?

The Witness: At the time, Your Honor, I had not received any such permission. I had not requested such [89] permission. Subsequent to this litigation, I requested a written release from Pan

(Testimony of Eugene L. Grindle.)

American which they gave me. I have received permission on two other items which I have patented, that were developed primarily for aircraft use, which they have given to me completely with not even shop rights retained.

Q. (By Mr. Hohbach): After you placed the order with Mr. Welch, did you do any additional planning for receipt of the dipsticks?

A. I am sorry——

Q. After you placed the initial order with Mr. Welch, did you do any additional planning at Pan American for receipt of these sticks?

A. Yes, I did. As soon as the purchase order was in and a tentative delivery date was established, I immediately prepared correspondence and instructions to the various departments and stations around the world, advising them that the dipstick would be placed into effect and use on August 1st, 1948.

Q. Did you write letters giving these instructions?

A. Yes, I did.

Q. Are these copies of the letters.

A. One of these is a letter dated June 14, 1948, which goes into the story of why we were developing a new dipstick, that the old ones were—calibration was in question, and we wanted an improved type, and so on. And then it covers [90] certain things about revising maintenance and operations manuals and placards that were on there, that were changed as a result of this project.

Q. Did you write that letter?

(Testimony of Eugene L. Grindle.)

A. I wrote this letter, as evidenced by my initials again, in the lower corner.

Q. Who signed the letter?

A. The letter was signed by Mr. Connor for Weesner.

Q. Do you have any other letters?

A. I have another letter here dated June 22, 1948, which was sent to all station managers, all chief mechanics and all flight engineers around the Pacific Division. The purpose of this letter was to advise them that the maintenance manuals would be revised, the operations manuals would be revised and supplies of the sticks would be shipped and the effective date for putting them into use was August 1st, 1948.

Q. Did you write that letter?

A. I also wrote this letter. That is now signed by Mr. Kiester for Weesner.

Mr. Hohbach: I offer these in evidence as Plaintiff's Exhibits 14 and 15. Give Exhibit No. 14 to the letter of January 14, 1948, and No. 15 to the letter of June 22, 1948.

The Clerk: Plaintiff's Exhibits 14 and 15.

(Whereupon letters identified above were received [91] in evidence and marked Plaintiff's Exhibits Nos. 14 and 15.)

Q. (By Mr. Hohbach): When did Mr. Welch promise to deliver the dipsticks?

A. Mr. Welch promised to deliver the dipsticks within three to four weeks and I suspected that we would have adequate time between them and the

(Testimony of Eugene L. Grindle.)

date that they would be placed into effect to get them distributed around the world where they would be used some time prior to August 1st.

Q. Did he deliver them when he had promised?

A. No, he did not. He was having some difficulty, or he told me he was having some difficulty in manufacturing them, and that he would be delayed. He made an advance shipment of the order of some 54 of the original hundred on August 12th which was some two weeks after the deadline that I had set up to put them into effect.

Q. How do you remember those dates?

A. Well, on the date that they were received because it was a new product, the receiving inspector was not familiar with it and he called the design engineer, which is their usual procedure to have him instruct the inspector as to what he should look for, what kind of inspection the item should be given.

Q. Were reports made at the time the dipsticks were received. [92]

A. Yes, as soon as any shipment is received on a purchase order, what is called a receiving report is written on the delivery.

Q. Are these copies of the receiving reports?

A. This copy here is the original one, No. 49986. That is receiving report dated August 12, 1948, for 54 dipsticks, seven of which were rejected.

Q. Now, what does the other sheet state?

A. The other sheet is a receiving report which is issued for the purpose of notifying people why certain numbers were rejected and returning them to

(Testimony of Eugene L. Grindle.)

the vendor. This particular report says that seven of these dipsticks were rejected because scales were improperly located in the tube.

Q. You stated you were called in for receiving these dipsticks. Why were you called in?

A. I was called in because I was the designer; I initiated the requisition and I was called in to advise the receiving inspector as to what type of an inspection he should give them.

Q. And do you remember why those seven dipsticks were rejected?

A. Yes, I do; they were rejected because the calibration was not within the tolerances that we required.

Mr. Hohbach: I offer these in evidence as Plaintiff's Exhibits 16 and 17. Give Exhibit No. 16 to the document that [93] has No. 49700 and No. 17 to the document bearing No. 49986.

The Court: It may be received.

The Clerk: Plaintiff's Exhibits 16 and 17 in evidence.

(Whereupon two receiving reports referred to above were received in evidence and marked Plaintiff's Exhibits Nos. 16 and 17.)

Q. (By Mr. Hohbach): What was done with the dipsticks after they were received?

A. I outlined to the receiving inspector certain things that I wanted him to look for to see that they were acceptable, and actually picked out a couple myself that were to be rejected and showed him

(Testimony of Eugene L. Grindle.)

specifically what I wanted him to look for. Then I took several of them that were acceptable and immediately took them to the equipment shop and showed them what they were and told them they could now draw them from stock and immediately put them on airplanes. I also went out to the flight engineering office and gave them several of them so they could see what it was, because they were the people that would be using them, and left several in that office.

Q. Were the dipsticks put into use immediately?

A. From that day every airplane that left San Francisco left with a dipstick on it, the new type dipstick on it.

Q. Can you describe how the dipsticks that were first delivered by Mr. Welch were constructed? [94]

A. The first dipsticks that were delivered by Mr. Welch were constructed in accordance with my drawing, that is, Plaintiff's Exhibit 8, with the exception of the plugs in the end. The ends were cemented instead of plugged. This cement, because it contains a certain amount of solvent and shrinks as the solvent is evaporated, and the cement hardens, shrinks and distorts the ends of the tube. That is, the square tubing. It sort of draws it in.

Q. Did you note this at the time the sticks were delivered?

A. Yes, I did, and I called it to Mr. Welch's attention at the first opportunity. I believe I called him that same day, and I told him that we were going to accept them but I would like him to do a

(Testimony of Eugene L. Grindle.)

better job on the ends, and asked him at that time why he didn't use the plug in it.

Mr. Hohbach: Mr. Naylor, would you allow us to admit into evidence this time the stick you said was delivered at that time?

Mr. Naylor: Can you identify it?

Mr. Hohbach: Well, in one of the depositions we identified it as one of the sticks that were delivered at that time. It was one of the first ones that was delivered, or it was identical to it; I don't remember which. I remember distinctly it had warped ends on it and you showed it to us in our office.

Mr. Naylor: That's Defendant H for identification on [95] the deposition of Mr. Grindle which I now hand you.

Mr. Hohbach: Are you willing to stipulate that this is one of the first sticks that was delivered to Pan American?

Mr. Naylor: I don't think I can go that far. It was one of the originals, is how we had it.

Mr. Hohbach: What does the stick represent?

Mr. Naylor: As nearly as we understand it, it is a duplicate of the six originally delivered, the batch of 54. Isn't that correct?

Mr. Martin: May I talk?

Mr. Naylor: No. Excuse me, Your Honor.

Mr. Hohbach: You say it is a duplicate?

Mr. Naylor: It was made from that same batch.

Mr. Hohbach: I see.

Q. Does this look like one of the dipsticks that

(Testimony of Eugene L. Grindle.)

was delivered to you by Mr. Welch in the first delivery?

A. Can't see where it's—I can't see where the scale is put together on it. I mean, I am not so sure about the scale, but as far as the construction of the ends is concerned, it is very similar to the first batch that we received.

Q. Can you tell whether this stick had laminated ends?

A. The stick does not have laminated ends. You can see the way the end is shrunk in, that it was a cement process which shrunk and drew the end in slightly. [96]

Q. Does the paint obscure that fact?

A. No, not entirely. The paint, if you look at it from the end, you can see it is impressed there.

The Court: You can see it from here.

The Witness: The other end the same way: it is shrunk slightly. The reason I hesitate to say that that may be the same is that before Mr. Welch had delivered any dipsticks he came to me and said that he had trouble getting a plate made to print the calibration, that it was very costly to him, and he thought he was going to lose a lot of money. And I said, "Well, we have printing facilities here. That is a very small part of the job. I will have the calibrations printed in our shops. We can only print them in a plate. I believe, at the time, fourteen inches long, so you will have to put this on in sections. But I will print that and give you the calibrations printed in our shop." I printed several

(Testimony of Eugene L. Grindle.)

hundred of them and gave them to Mr. Welch to use in the original dipsticks.

Q. (By Mr. Hohbach): Is this one of the printed scales you made?

A. I can't say for sure, but that is not one of those I gave him because ours were shorter and he had to piece them together.

Mr. Naylor: Pardon the interruption. Could we fix a time for the printing of the calibration chart to which Mr. [97] Grindle was referring?

Q. (By Mr. Hohbach): When did you give these calibration charts to Mr. Welch?

A. Well, that I couldn't answer very specifically. It would be some time within the time that we issued our purchase order and he delivered them. That was the first difficulty that Mr. Welch told me he was having.

Q. It was some time after you issued your purchase order, is that right? A. It was.

Q. Now, you stated that this scale was not made at the Pan American shop, is that correct, as far as you know?

A. Well, if it is printed, it was not made at the Pan American shop. I understood later—and this is hearsay, if I may say—that Mr. Welch had actually bought a plate, but it was ruined very early before he had produced many scales, and he couldn't afford another plate, and that was the way I understood it. That's when I got into it, to print the scales for him.

(Testimony of Eugene L. Grindle.)

Q. That is why he wanted you to make up the scales?

A. Well, he didn't ask me to—I volunteered to make the scales for him.

Mr. Hohbach: I would like to offer this in evidence as Plaintiff's Exhibit 18, as an example of one of the sticks first delivered by Mr. Welch to Pan American. [98]

The Court: Let it be received.

Mr. Hohbach: I understand that is correct from Mr. Naylor's statement.

The Clerk: Plaintiff's Exhibit 18 in evidence.

(Whereupon, dipstick referred to above was received in evidence and marked Plaintiff's Exhibit No. 18.) [98-A]

Q. (By Mr. Hohbach): You state that 54 of the dipsticks were delivered. When were the rest of the dipsticks delivered?

A. They were delivered within about a two or three week period after that. The order was not completed for several weeks, as I recall. I personally was not called in for inspection and consultation any more, because that had already been taken care of on the first delivery.

Q. Was Mr. Welch—strike that.

Was Mr. Welch paid for the dipsticks he had delivered?

A. Mr. Welch came to my office the day that he completed delivery of the dipsticks, and on many occasions he had told me he really needed money, and on the day that he completed his delivery, he

(Testimony of Eugene L. Grindle.)

asked me if I could help him get payment for it, and I was instrumental in him being paid that very day for the sticks.

Q. What did you actually do?

A. I called our Supply Department, told that that if they were received, the last shipment was received, gave them the numbers of the receiving reports and so on, so that they could expedite payment on the purchase order.

Q. Is this a copy of the check by which Mr. Welch was paid?

A. Yes, it is; this is Pan American Check No. 62829. It is dated September 2nd, 1948, in the amount of \$325, plus tax of \$8.13. [99]

Q. And he was paid for 100 dipsticks, is that correct?

A. He was paid for 100 dipsticks.

Q. Did Mr. Welch deliver 100 dipsticks?

A. Yes, he did—in several shipments, not all at once.

Mr. Hohbach: Offer this in evidence as Plaintiff's Exhibit 19.

(Whereupon, check referred to above was received in evidence and marked Plaintiff's Exhibit No. 19.)

Mr. Hohbach: Were additional purchase orders given to Mr. Welch?

A. Well, as far as the C-54 dipstick was concerned, that was now a stock item. It became a stock item as soon as they were accepted and placed in stock. From then on, the Supply Department deter-

(Testimony of Eugene L. Grindle.)

mines over a reasonable period what the usage rate is, and they set a minimum stock order and automatically reorder. So far as my particular job was concerned with relation to the C-54 dipstick, I had no more to do with it. But a month or so after the period we have just been discussing, we received some new airplanes, the Boeing Stratocruiser B-377, and I immediately—prior, actually, to receiving the airplanes, I requested a fuel tank calibration from Boeing Aircraft Company, and we purchased Boeing dipsticks from Mr. Welch for this new airplane, the same basic design but with different airplane calibrations on it. [100]

Q. And do you know that additional orders were given to Mr. Welch?

A. I myself initiated the order by requisition for the first order for Boeing dipsticks, because, again, it would be a new part number, a new stock item.

Q. What was the price that Mr. Welch quoted on those dipsticks?

A. Well, subsequent to placing the second order and after delivery of the first order, Mr. Welch came to my office one day and said that he was not making out too well, he had actually lost money on these dipsticks at \$3.80, and I said, "Well now, I am not,"—speaking for Pan American, "We are not interested in your making things for us unless you are making a profit on it. It is up to you to set the price for you, and even though we have sort of agreed on a price for this thing, if you are not

(Testimony of Eugene L. Grindle.)

making money, why, you won't be able to supply us very long. So we are not interested in you losing money. So what do you need for it?"

He said, "Well, I don't know." He said, "I don't really have all my cost figures in." And so I said, "Well,"—as a matter of fact, I spent a lot of time on this project, as small as it was, in discussions with Mr. Welch, and I had many other things to do, so I volunteered the price of \$3.80 and asked him if he could make out all right on that. [101]

He says, "Yes, that would be very fine." I says, "All right, we will establish the price at \$3.80."

So the second requisition, which I was instrumental in for the Boeing airplane was issued for \$3.80 each.

Q. What was the next purchase order given to Mr. Welch?

A. That was the last purchase order that I was instrumental in, because from then on they were just set up and reordered automatically by the Supply Department. But some time after he had delivered the sticks for the Boeing aircraft at \$3.80, he again came to my office and said that he still was not making any money, but that he had prospects now of selling to other airlines; I don't believe that he had sold anyone else yet, at this time.

Mr. Naylor: Could we fix the time, Mr. Grindle?

The Witness: This was some time right at the end of the year, the first part of 1949, maybe January or February of 1949, early that year.

(Testimony of Eugene L. Grindle.)

A. (Continuing): And he said, "I am not making any money on it, but I have got the possibility of selling to other people." But he said, "I wonder if we could raise the price again?"

So I said, "Well, Martin, if you are going to raise the price again, I would like you to outline in writing why you feel it necessary to raise the price because," I said, "actually I am working for Pan American and I can't be encouraging [102] you to raise prices. So you will have to do it in writing and it will have to be approved by somebody higher than myself."

So he wrote a letter.

Q. Is this a copy of the letter that Mr. Welch wrote to you?

A. This is the original of the letter he wrote to Pan American Airways, to my attention.

Q. What does he state in the letter?

A. Well, he says that this letter is concerning the present prices quoted for dipsticks, and he went into detail to explain that he had initially quoted without knowing what his costs would be, and that now his costs were in, he found that he was not making money at \$3.80. And since he has gotten into it more now, he can definitely say that in the future he can sell them to us for \$5 apiece.

He explains here that he is going to sell them on a wholesale basis at \$5 to manufacturers and distributors and that he would give us the same price as the wholesale distributors, and that the retail price to other airlines and so on would be \$6.50.

(Testimony of Eugene L. Grindle.)

So this conveyed the fact that we were to get a price consideration of \$1.50 apiece. And his last paragraph said that "We furnish Pan American Airways with dipsticks manufactured to their specifications comparable to the present type in the future at the figure set for the [103] above-mentioned distributor's allowance, that is, net \$5. per stick delivered to your receiving department."

Q. Is this the first time that you had heard that he was going to give Pan American a price consideration?

A. Well, it was my understanding from the very day that I issued a letter or offered a letter, which Mr. Carter actually issued, to Mr. Welch—from June 10th, the date of that letter, I was of the opinion that Pan American, all divisions of Pan American, would be getting a price consideration on this dipstick.

Mr. Hohbach: I offer this in evidence as Plaintiff's Exhibit 20.

The Court: Let it be received in evidence.

(Whereupon, letter from Welch to Pan American referred to above was received in evidence and marked Plaintiff's Exhibit No. 20.)

The Court: We will take the afternoon recess, gentlemen.

(Recess.)

Q. (By Mr. Hohbach): When you were reading that, Mr. Welch's letter of February 10, 1949,

(Testimony of Eugene L. Grindle.)

you were reading the bottom paragraph when he stated that he was going to sell the dipsticks to Pan American for a price less than he was going to sell to other people? A. Yes, I did.

Q. Did you inform any other divisions of Pan American of [104] this price concession by Mr. Welch?

A. Yes, I did, in a letter that I wrote, that I offered to the other divisions of Pan American Airways shortly after Mr. Welch's letter.

Q. Is this a copy of the letter?

A. Yes, this is a copy.

Q. What does the letter state?

A. Well, the letter actually is covering several facets of the program here on the B-377 fuel tank dipstick. The other divisions of Pan American were also acquiring this type of airplane and would be using the same dipstick. They had questioned in correspondence the practicability of a plastic dipstick. Although we had sent them samples of the original stick that Mr. Welch made for us, they didn't get into the proper hands, and some of the other people had questioned just whether or not they would hold up or not.

So I outlined in this letter that it was a dipstick similar to the type that we had used on our C-54, and I said that the price on this dipstick is now \$5 each to Pan American only, and other users will pay \$6.50 each.

I said, "This special price to us is due to our developmental assistance and will hold firm for all Pan American orders."

(Testimony of Eugene L. Grindle.)

developmental assistance and will hold firm for all

Q. Did you write this letter?

A. Yes, I did, as evidenced by my initials again in the [105] lower left-hand corner.

Q. Who signed the letter?

A. The letter was signed in this case by Mr. Kiester for Mr. Weesner.

The Court: What is the meaning of this sentence:

“This compares with the price of \$15.50 each * * *” I suppose that is Boeing?

The Witness: Yes.

The Court: “* * * for Boeing type * * * and \$9.90 each for the Roylin * * *”

The Witness: Yes, your Honor.

The Court: Are they two different types of sticks?

The Witness: Yes, they are different types entirely. The Boeing Aircraft Company, the designer of this airplane, in the design stages of an airplane the manufacturer deals with various manufacturing companies and both Roylin and Boeing designed a dipstick. We had received samples of those dipsticks. We didn't consider them to be as good as this one, and the price was higher. It wasn't advisable to buy those, and this was just corroborating the fact that the sticks that we were purchasing from Mr. Welch were cheaper than those that we could acquire elsewhere.

The Court: Just as a matter of interest and in-

(Testimony of Eugene L. Grindle.)

formation, these two other types of sticks; are they based upon the same principle and do they employ the plastic [106] construction?

The Witness: No, your Honor, they are both based on somewhat the old principle of the wooden stick. It was black, both of them were black aluminum tubes, a tube that was in one case attached right to the fuel tank cap. The black tube was painted with a sort of a dull black lacquer, so that the wet spot of the fuel would show on it.

Then there were white calibrations on to show how full it was. There was one of those on each tank, also—whereas this one was, one stick was used for all tanks.

Mr. Hohbach: I offer this in evidence as Plaintiff's Exhibit 21.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 21 in evidence.

(Whereupon, letter referred to above was received in evidence and marked Plaintiff's Exhibit 21.)

Q. (By Mr. Hohbach): How long were you in the engineering department at Pan American?

A. Well, I was in the Engineering Department from my employment, December 1st, 1947, until June 1st, 1949.

Q. What happened to you after June 1st, 1949?

A. June 1st, '49, I was promoted to the job that I now hold, and my title is Technical Assistant to the Chief Flight Engineer.

(Testimony of Eugene L. Grindle.)

Q. What are your duties in this new job? [107]

A. My duties in the new job are to act as a liaison between the Operations Department and the Maintenance Department, and such other departments that we may have to deal with in the operation group. I work directly with the flight crews getting their troubles and so on, and I initiate corrective action, such as redesigns that are necessary, and so on, and refer them to the Engineering Department for accomplishment.

Q. Do you still hold this position?

A. Yes, I do.

Q. Did you have anything to do with the design and procurement of dipsticks after you were transferred in 1949?

A. I don't believe I had anything whatever to do with dipsticks after this last letter that we just introduced.

Q. That is Plaintiff's Exhibit 21.

When did it first come to your attention that Mr. Welch had patented the dipsticks?

A. Well, in September, 1953, the Engineering Department at my initiation, or I initiated the project for them to make a calibration check of the fuel and tank quantities of the B-377 aircraft. We were at this time intending to operate a long-range flight non-stop from Tokyo to Honolulu, and needed all the fuel tank capacity that we could get, to determine whether we could, how often we could operate that way. [108]

So we had had some question about whether the

(Testimony of Eugene L. Grindle.)

tanks held as much fuel as they were placarded to hold, so we had requested Pan American engineering to make a special calibration test, and I was called in to witness this test as an official observer—it is one of my jobs to see that the test was conducted the way we requested it.

Q. Who called you in on the test?

A. I was called in by Mr. Dick Burfiend, who was in charge of the test.

Q. How were you called in to the test?

A. He called me on the telephone early one morning to tell me that the airplane would be set up, I believe he said, at ten o'clock that morning, would be set up to start the calibration test, and would I be at the site at that time.

Q. Did you arrive at the site at the appointed time?

A. Yes, I did, at the appointed time Mr. Burfiend, when I arrived at the airplane, was up on top of the wing and he had one of Mr. Welch's newer dipsticks with him. He actually had several dipsticks, which we were using to cross-check the calibration.

And as I arrived out to the airplane, he said, "Hey," he said, "I see Welch got a patent on a dipstick."

Q. What did you say?

A. Well, I might have uttered somewhat of a profane remark and I said, "Could I see it?" So he threw it down on [109] the ground, I looked at it, I recorded the patent unnumber on it. That was my

(Testimony of Eugene L. Grindle.)

first knowledge that there was a patent on it or even applied for.

Q. Did this come to you as a complete surprise?

A. As a complete surprise.

The Court: What date was that?

The Witness: September 28, 1953.

Q. (By Mr. Hohbach): How do you fix that date, Mr. Grindle?

A. I fix the date because I had recalled the incident and I went to Mr. Burfiend to see if he recalled it, and he did. He dug into his test data file, his records, and produced a document which was dated September 28, 1953, and on which he outlined what the test was for and the fact that he had called me in to witness it.

Q. And do you remember yourself approximately when this test took place?

A. Yes, I do, very definitely.

Q. Had Mr. Welch ever mentioned to you that he was going to patent the dipstick?

A. He did not.

Q. Had it ever come to your attention that Mr. Welch had marked "Patent pending" or a patent number on the dipstick before this date?

A. Never had. I had no—not even the remotest knowledge that he was patenting it or even thinking of patenting it. [110]

Q. Does Pan American still use the dipsticks supplied by Mr. Welch?

A. Yes, they do. The dipstick is still a good,

(Testimony of Eugene L. Grindle.)

functional device. To date I haven't seen anything any better.

Q. Are they still buying dipsticks from Mr. Welch?

A. They will still buy them as long as he is the only producer.

Q. Why are they buying them from Mr. Welch?

A. They are buying them from Mr. Welch because he is the only one that produces them.

The Court: Paying the same price for them now?

The Witness: I didn't take the trouble, your Honor, to—I knew that Mr. Welch had delivered some dipsticks approximately a month ago. I did not inquire as to what he billed them at. I have that available to me if I would ask for it, but I just assumed he was still charging \$12.50.

Q. (By Mr. Hohbach): After you discovered the patent number, what did you do?

A. Well, at the moment I stayed there and witnessed the completion of these tests, and as soon as I was free——

Q. Could you describe what took place in this test from your memory?

A. Well, the purpose of the test was to check the calibration. We had all this time used the original manufacturer's calibration on the tanks and had never actually checked it. [111] So we had set the airplane in the normal ground attitude condition with the wings lateral and level and the fusilage 2 degrees tail down, which was the basis of the airplane configuration for the calibration.

(Testimony of Eugene L. Grindle.)

We then drained all the fuel down to the outlet level, and we stopped at that point and made sure that no more fuel could be supplied to the engines from that outlet, and then we drained the sumps in the airplane to determine what is called "unusable fuel" in a tank, because unusable fuel is down below the level that can be fed to the engines in certain attitudes of the airplane, and the dipstick that was—it has always been specified that a dipstick or any fuel measuring system on an airplane must only account for usable fuel, fuel that can actually go to the engines.

There was a total of some 50 gallons of fuel on this airplane that is unusable.

So that preliminary figure had to be determined first. Once that was done, we started filling the tanks on opposite sides of the airplane in equal increments, 20 gallon increments, and taking quantity readings with the dipsticks, and the airplane fuel gage system, and calibrated all the tanks on the airplane.

The calibration turned out to be very close to what—that is, within practical repeatability of airplanes, so that we did not change the [112] calibration.

Q. And as soon as you completed the test, what did you do?

A. Well, as soon as the tests were completed and I had a free minute, I had become rather annoyed in my mind with the fact that Mr. Welch had patented this thing, I was familiar enough with

(Testimony of Eugene L. Grindle.)

patents to know that an inventor had to swear that it was his invention, and it rather annoyed me to think that anyone would do that with this item.

So I went to the files and dug out the old files which had actually been inactive from the time that I had last been on the project, and until Mr. Burfiend had started this calibration test.

I dug out all the old correspondence on it, I went to the Supply Department and had them initiate and request from our other divisions an accounting of how many sticks they had bought and what they had paid for them since the price was raised from \$5.

Q. Had you done anything before this, before you started doing this?

A. Had I done anything? Well, yes, I called Mr. Welch on the phone the first opportunity I had and asked him what the idea was of him patenting it.

Q. What did Mr. Welch say?

A. I was informed in no uncertain terms that, what business was it of mine? That it was his invention, and what was I inquiring about it [113] for?

Mr. Naylor: Could we fix a date for this?

Q. (By Mr. Hohbach): Approximately when did you——

A. Approximately the first of October. I recall that when I tried to call Mr. Welch first, I talked to his secretary in the city here. She said he was not in town, and I left a message for him to call me, to

(Testimony of Eugene L. Grindle.)

return my call, which he did in a matter of two or three days.

So it was probably the first week in October that I talked to Mr. Welch—1953.

Q. That's when you asked him about patenting the dipstick, is that correct? A. Yes, it is.

Q. What did Mr. Welch say?

A. Well, I don't recall his exact words, but in essence he said that it was none of my business, that it was his invention and what right have I got to question him.

Q. What did you do after that?

A. Well, I then went to our Supply Department, because I had dug out this old letter, last letter from Mr. Welch, stating that in the future he would sell to Pan American for \$5.

So I took several weeks, actually, to get an accounting from the other divisions, and that was about a two-year period involved there, and in that two-year period there were overcharges of over \$10,000 to Pan American Airways over and above the \$5 that was stipulated in Mr. Welch's [114] letter.

Q. What had Mr. Welch charged Pan American Airways for the dipsticks?

A. Well, at the time he was charging \$12.50, but it had gone up gradually from the \$5 level shortly after I left the engineering department, it had increased gradually and if it had gone at that time to the \$12.50, why, the overcharges would have been considerably more.

(Testimony of Eugene L. Grindle.)

Q. Were you aware before this time that Mr. Welch had increased the prices on the dipsticks?

A. I had no knowledge of it whatsoever. I had seen Mr. Welch occasionally from time to time, just in passing.

I might say that in the first year or so after I had met Mr. Welch, we were a little friendly. I saw him socially at his home, he was at my home. And I had never at any time been informed by Mr. Welch or even had any knowledge whatsoever that he had raised the price above the \$5. I thought we had an agreement that was still being in effect.

Q. Did you see the Legal Department of Pan American?

A. Yes, I did. Once the information was in from the other divisions, I went to our legal officer, Mr. George Fox, and gave him the file and told him briefly what my story was on the thing, gave him the correspondence and the figures from the Supply Department.

As a matter of fact, the Supply Department directly gave [115] the information to Mr. Fox. And he had it for several weeks, I believe, being quite busy, and when he got to it, he reviewed the file. He called Mr. Welch in, talked to him, I believe, on two separate occasions.

I had said something about this being the original drawing—and I pointed to Plaintiff's Exhibit 8. Mr. Welch said that that was not the original drawing, and said that he would go to Los Angeles, where

(Testimony of Eugene L. Grindle.)

he thought he could produce an original drawing. And he came back with three copies of this drawing here, Plaintiff's Exhibit—that small——

Q. You are referring to the extrusion——

A. The small extrusion drawing.

Q. Plaintiff's Exhibit 6?

A. Yes. And he said that that was the original drawing, not Plaintiff's Exhibit 8.

Well, I may have been remiss in not mentioning that there had been a previous drawing on an extrusion, but this was the initial drawing on a complete dipstick.

Q. What did Mr. Fox do?

A. Well, after looking into the situation more thoroughly then, he found that each time that Mr. Welch had increased the price of the dipsticks, he notified our Supply Department of the increase, they issued a purchase order subsequent to his notification of the increase.

Mr. Fox considered that was tacit approval for the [116] increase, and that we, as Pan American, had no recourse to recovering overcharges.

Q. Did the Supply Department know about this price agreement in Mr. Welch's letter?

A. No, that's where I was very negligent in my—I suppose—responsibility, in that I myself had negotiated this arrangement with Mr. Welch, but I did not follow up to advise the Supply Department either in our division or in the other divisions that we had this agreement with Mr. Welch. I just as-

(Testimony of Eugene L. Grindle.)

sumed that it would be lived up to, that there would be no change in it.

Q. Did the Legal Department of Pan American take action against Mr. Welch?

A. No, they decided that the question of overcharges, that there would be no recourse for them to recover overcharges, and said that if I was interested in pursuing the thing from the patent standpoint, that I could do that myself, it would be my own responsibility and at my expense; that they wouldn't prosecute a patent case.

Q. What did you do after that?

A. This time, now, there were several months that had elapsed here from the time that I first learned that it was patented until I spoke to my attorneys, but at some time, I believe, in the early part of 1954, when I was in my attorney's office, on some other patent business, I [117] mentioned this case to them, and they asked me to bring in certain files so they could look at the thing, and that was the initial effort to take legal action against Mr. Welch.

Q. After this time did you participate in a conference with Mr. Welch?

A. Yes, I did. After a letter had been written by my attorneys to Mr. Welch demanding the assignment of the patent to me, which they replied and refused, my attorneys requested a personal conference between the principals in the case, Mr. Welch and myself, and respective attorneys, to discuss the situation.

(Testimony of Eugene L. Grindle.)

Q. Who was present at this conference?

A. Present at this conference were Mr. Bruce Freitas, Mr. Welch's attorney, Mr. Welch, Mr. Paul Flehr, Mr. Harold Hohbach, my attorneys, and myself.

Q. Do you remember the discussion that took place during this conference?

A. Yes, the discussions revolved generally about a followup of the initial letter demanding assignment of the patent. They were again asked if they would give an assignment of the patent, they said they would not, and in the course of the discussion Mr. Flehr, my attorney, asked Mr. Welch if he would prosecute me or bring an action against me if I were to produce the type of dipstick contained in Plaintiff's Exhibit 8. [118]

Mr. Welch informed us very definitely that he would prosecute me if I did.

Q. What did Mr. Welch say?

A. Well, he said, he got up and waved his hand pointed at this drawing, Plaintiff's Exhibit 6 I believe it is, and said that I could produce that one if I wanted, but if I produced this one he would sue me (indicating).

Mr. Naylor: Could we establish what is meant by "this one"?

The Witness: That's Plaintiff's Exhibit 8.

The Court: 8.

Mr. Naylor: Thank you.

Q. (By Mr. Hohbach): Do you intend to manufacture and sell dipsticks?

(Testimony of Eugene L. Grindle.)

A. Yes, I do. I have held off this long because of the threat of possible legal action. My stockholders in my company have authorized me only to go so far in this program to manufacture them, and I have produced a production model of five different airplane dipsticks, and I am all ready to go.

Q. When did you first form this intent to manufacture and sell dipsticks?

A. Well, I more or less definitely formed the intent to manufacture the dipsticks at the time that I learned that Mr. Welch's excessive charges for the item to Pan American—when I learned of that. Pan American at the time of this investigation had their shops, they sent copies of this [119] drawing, Plaintiff's Exhibit 8, and samples of Mr. Welch's dipsticks to the shops and asked them to quote on manufacturing them in our shops, and because Pan American employees are on a very high pay scale and we have a high overhead, they determined they would just continue to buy them from Mr. Welch, rather than to make them themselves.

So at that time I decided that I would be interested in making them and selling them to Pan American, and anyone else that I could. And I had certain ideas at the time for improvements, things that have been—deficiencies in Mr. Welch's sticks, in my opinion all the time, and that I could improve and make a better stick out of it.

Q. Do you still have the intent to go ahead and manufacture and sell dipsticks?

A. Yes, I have, very definitely.

(Testimony of Eugene L. Grindle.)

Q. Does the dipstick you intend to manufacture incorporate the features shown in the drawing, Plaintiff's Exhibit 8? A. Yes, it does.

Q. Why haven't you gone ahead and manufactured and sold dipsticks?

A. Well, purely because the only West Coast supplier of the square extrusion to be used is Mr. Welch's company in Los Angeles. I wrote to them several times asking for quotations. I was told by a source that I have that my correspondence was referred to Mr. Welch, and I never received [120] a supply from them. I was also informed how to go about getting price quotations from the Plastics Process Company without going through Mr. Welch, which I have done, and I have received price quotations, and I am ready to order.

The only thing I am holding back on is the fact that in purchasing plastic extrusion, you have to purchase large amounts—quantity production. They are not interested in selling small amounts unless they charge a set-up charge, and it is an excessive cost per foot.

Q. Why haven't you gone ahead and ordered this plastic extrusion?

A. Well, primarily because it involves the expenditure of several thousand dollars, and I didn't want to go to that expense and also be faced with possible legal action from Mr. Welch.

Mr. Naylor: Could I hear that last answer, if the Court please?

The Court: Read it, Mr. Reporter.

(Testimony of Eugene L. Grindle.)

(Record read.)

Mr. Naylor: Thank you.

Q. (By Mr. Hohbach): What was the main reason you haven't gone ahead and manufactured and sold dipsticks?

A. Well, one of the main reasons is that the dipstick that Mr. Welch has, has a patent number on it. That would be a difficult thing to overcome, except possibly with my own [121] or contacts that I have in the aircraft industry. It would be a little difficult for me to come in and sell an idea essentially similar to that which Mr. Welch produces and which has a patent number on it.

Q. Have you been threatened with an infringement suit if you go ahead and manufacture?

A. It was definitely threatened, I was definitely threatened with an infringement suit by Mr. Welch.

Q. Upon what do you base this?

A. I base that on the verbal words of Mr. Welch during this conference in my attorney's office.

Q. Do you have any resources and facilities to manufacture and sell dipsticks?

A. I have adequate resources to manufacture and sell dipsticks.

Q. Do you have a corporation?

A. I have a corporation that has been formed for the last five years now.

Q. What office do you hold in that corporation?

A. I am the president of the corporation.

(Testimony of Eugene L. Grindle.)

Q. And the corporation has any assets, does it?

A. The corporation has considerable cash assets.

Q. Would you mind telling what the cash assets are?

A. Approximately \$11,000.

Q. Is that adequate to commence—strike [122] that.

Is that adequate to produce and manufacture dipsticks?

A. In large quantities.

Q. Does the corporation intend to use the assets for the manufacture and sale of dipsticks?

A. Yes, they do.

Q. Does the corporation have the right to manufacture dipsticks?

A. The corporation has a verbal authorization from me to manufacture the dipsticks.

Q. Has the corporation worked on such a basis before?

A. Yes, they have. They have produced this aircraft vibrometer, on much the same arrangements.

Q. Does the corporation at the present time manufacture and sell the vibrometer?

A. Yes, they do. I am selling aircraft vibrometers to the Air Force, the Navy and many other airlines.

Q. Is this the vibrometer?

A. Yes, it is. This is one of my later models of this vibrometer. It has a plastic case with laminated enclosures on it, and so forth.

Q. How long have you been selling that vibrometer?

A. I have been selling this vibrometer for ap-

(Testimony of Eugene L. Grindle.)

proximately, well, either two or three years—I believe three years.

Q. To whom have you sold this vibrometer?

A. I have sold it to Pan American Airways, to the Air Force, [123] the Navy, CAA, Eastern Air Lines. It is an item that has received great publicity in certain trade magazines and so on, and I am just recently getting many inquiries. Much interest is shown in it.

Q. You have a sales organization set up to sell the vibrometers?

A. Well, at the present time I have been doing most of the selling myself, but I have associates with me who are essentially in the sales field.

Q. Would the same sales organization be used for selling the dipsticks?

A. Yes, with again calling on exactly the same customers for both items.

Mr. Hohbach: I offer this in evidence as Plaintiff's Exhibit 22.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 22 in evidence.

(Whereupon, vibrometer referred to above was received in evidence and marked Plaintiff's Exhibit 22.)

Q. (By Mr. Hohbach): What has been done toward readying the corporation for manufacturing the dipsticks?

A. Well, I have produced the scales, graduation scales for several different airplanes—five, to be

(Testimony of Eugene L. Grindle.)

exact—and have made master templates to produce additional scales as required, and I have [124] produced——

Q. Did that require considerable expenditure?

A. Yes, it did.

Q. Would you mind telling us approximately how much? A. Approximately \$500.

Q. What else have you done?

A. I have also manufactured tooling to make certain parts of the dipsticks and special jigs for accurately assembling them.

Q. Have you solicited quotations for the plastic extrusions?

A. Yes, I have complete quotations on all parts of the dipstick.

Q. Have you made a production model?

A. Yes, I have made several of the production models.

Q. Are these your production models?

A. Well, they are, with the exception that I have left one end slightly different here to illustrate the different types of plugs that can be put in in the end piece to strengthen it and seal it. With that exception. They are not painted on that end. With that exception they are not a production model.

Q. Would you describe which one has which end plug with reference to the color coating?

A. Yes, this C-54 stick with the yellow color coating has solid $\frac{3}{16}$ ths inch plug in it, as called for initially on the drawing, Plaintiff's Exhibit 8. So this is constructed [125] in exactly the manner

(Testimony of Eugene L. Grindle.)

called for on that drawing. You can see the end is a solid $3/16$ ths inch plug. I actually polished, buffed the end so you could see clearly that it was just one piece and that there was a good cement seal around it. There is a little deformation on that end, due to the buffing, trying to clear it up so you could see through it. This other one here——

Q. That is the one with the blue marking on it, is that correct?

A. This is the DC-6B model, with the blue marking, is essentially the same except that the end is now, instead of one solid piece, is laminated from three $1/16$ th inch pieces; visually they look almost identical. The cement I use is a clear cement. When it adds up, the three pieces are actually molded or laminated into one solid piece, one homogeneous mass.

Q. Are these production dipsticks substantially identical to what is shown in your drawing, Plaintiff's Exhibit 8?

A. They are, except that they have an improved type calibration marking on them, a method I developed that would provide a much more accurate calibration than you can achieve by the method explained in this drawing.

Q. Do the ends differ from what is shown on the drawing?

A. The ends differ only to the extent that the $3/16$ ths inch plug is exactly the way the drawing was initially, [126] but in its present state with the A change incorporated, the drawing now calls for

(Testimony of Eugene L. Grindle.)

cement in the end, 3/16ths of an inch thick, instead of a plug. However, I would like to point out that putting cement in 3/16ths of an inch thick is essentially the same as putting in a solid plug, because when a cement hardens, it is a solid, homogeneous mass.

Mr. Hohbach: I would like to offer these sticks in evidence, marking one as Plaintiff's Exhibit 22, we will put that on the——

Mr. Naylor: The vibrometer is 22.

The Clerk: No, the vibrometer is—oh, yes.

Mr. Hohbach: 23, then. The one that has the yellow mark has Plaintiff's Exhibit 23, and it is for the C-55 plane.

On the other one, that will be Exhibit 24, and that has a blue marking. It is for the DC-6B.

(Whereupon, dipsticks referred to above were received in evidence and marked Plaintiff's Exhibits 23 and 24.)

Q. (By Mr. Hohbach): Have you expended time and money in addition to that expended by your corporation?

A. Well, I have devoted, I would say, all of my free time away from Pan American—that is, my own time away from Pan American—for the last six months or so, working on this program, raising finances, producing exhibits and samples and getting set up for production of the stick.

Q. Have you done anything prior to that? Had

(Testimony of Eugene L. Grindle.)

you done [127] anything prior to that in connection with the dipstick?

A. I am sorry, I don't understand.

Q. Had you done anything prior to that in connection with the production of the dipstick?

A. In connection with production of the dipsticks? I had solicited quotations and things from people, but I wasn't successful in getting the quotation from Mr. Welch's company. I did receive a quotation from an eastern manufacturer that makes the same square tubing, but it turned out later that it would be about the same cost to me to purchase material in the east and ship it out here as it would to buy it in Los Angeles and ship it to San Francisco. So my source of supply wouldn't be important from a cost standpoint. The cost would be about the same, and the minimum quantities that they are interested in are the same.

Q. Has your production model been improved by Pan American? A. Yes, it has.

Q. Have you been able to obtain any orders for your dipsticks?

A. I have not actually obtained or accepted orders for the dipsticks, primarily because I am not at this moment able to produce them. I have not expended the money to purchase supplies.

Q. If you had been able to sell dipsticks from the time that you originally had the intent to sell dipsticks, how many dipsticks do you think you could have sold during that [128] period of time?

Mr. Naylor: Could we first fix the time when

(Testimony of Eugene L. Grindle.)

this gentleman first had the intention to sell dipsticks?

The Court: Did you fix the time?

Mr. Hohbach: I think we did.

Q. Will you state when you fixed the time?

A. Well, I would say that the time was approximately October, 1953, about the time that Pan American had made their cost study and decided that they would still purchase the sticks rather than manufacture them in their own shops. It was just at that time, the middle or latter part of October, 1953, that I became interested in manufacturing them myself.

Q. Would you have been able to manufacture and sell dipsticks at that time if you——

A. I would have been able to manufacture them as far as my facilities and ability was concerned, but financially I didn't have the resources to expend the money that would be required to purchase materials.

Q. When did you have the sources, or when do you think you would have been able to go ahead and manufacture and sell dipsticks?

A. Well, if it hadn't been for—let's see. I have an association with a group down the Peninsula that has financed me on several ventures, and I had discussed this program with them and was interested in them financing it for me. [129] They said they would be very glad, it looked like it would be a good product. They liked the thing, and it looked likely I could make money on it. I had an

(Testimony of Eugene L. Grindle.)

indication of prices at the time. They said they would put—they would put the money in, that they would like to proceed with a lawsuit and get it out of the way so that that wouldn't be hanging over the corporation's head. They were the ones that felt it would be a little difficult to sell this item in competition with Mr. Welch when he had a patent number on it.

Q. Can you give us an approximate date as to when, if you had been free of the Welch patent, that you could have started selling and manufacturing the dipsticks?

Mr. Naylor: I am sorry, I did not hear that question because of the airplane passing overhead. May I have it read back, your Honor?

The Court: Read it, Mr. Reporter.

(Question read.)

A. Now, if I had started at the time that I became interested in doing that, which would be in October, '53, within 30 days after I had started, if I had been free of the patent situation, I would have been producing dipsticks.

Q. (By Mr. Hohbach): Well, starting from that period, how many dipsticks do you think you would have sold up to the present time?

A. Well, I have made a very, what I consider a very [130] conservative estimate, canvassed the field, and I believe that I could sell about 3,500 dipsticks a year.

Q. To whom would you——

(Testimony of Eugene L. Grindle.)

A. Considering that I would be in competition with Mr. Welch.

Q. To whom would you have sold these dipsticks, or do you think you could have sold dipsticks?

A. I would have sold them to the air force, to the government aircraft airline agencies, to other airlines and manufacturers, as well as foreign operators.

Q. Could you have sold them to Pan American?

A. Absolutely.

Q. Why do you think you could have sold them to Pan American?

A. I have been told that they would buy the dipstick from me.

Q. Have they purchased the vibrometers from you?

A. Yes, they have. They have been, for three years.

Q. If you were able to show them that you are ready to go into production, you could have gotten orders from Pan American?

A. I believe I can receive a Pan American order——

Mr. Naylor: Your Honor, this is highly speculative: every question is based upon an assumption of a fact that cannot be established here.

The Court: I will allow the question. You may answer it. [131]

Mr. Hohbach: I didn't understand, your Honor.

The Court: I say I will allow the question, but I believe the witness has answered it already.

(Testimony of Eugene L. Grindle.)

Q. (By Mr. Hohbach): You think you could have sold to other airlines?

A. Well, I am again very certain that I could have. As a matter of fact, Mr. Welch's success in selling these dipsticks has been partially due to assistance—not that I gave him, but recommendations that I gave this dipstick to the industry. A very close friend of mine, who worked with me at Pan American at the time that I developed this dipstick, is in a responsible position in Lockheed, and was instrumental in Lockheed purchasing dipsticks from Mr. Welch. As a matter of fact, he thought at the time that Mr. Welch was paying me royalties on it, or at least paying me some consideration for it.

Q. Is that individual still at Lockheed?

A. Yes, he is.

Q. What would have been your profits on these dipsticks?

A. Well, I can manufacture the dipstick at a total cost to me of less than \$2 apiece, and I consider that my selling expenses would be approximately \$2 apiece. If I sold them, therefore, at the same price that Mr. Welch sells them, I could make approximately \$8 profit on it.

Q. Are you familiar with patents? [132]

A. I am fairly familiar with patents, yes. I have had some experience.

Q. What was your first contact with patents?

A. My first contact with patents was when I was working for my father back in 1934 to '39.

(Testimony of Eugene L. Grindle.)

During that five-year period there were eight patents acquired by that company under my father's name, two of which were my design, my invention, but they were patented in my father's name. The first——

Mr. Naylor: May I have that answer?

The Court: “* * * patented in my father's name.”

A. (Continuing): The first patent that was actually applied for in my name was when I was employed with North American Aviation. It was on this automatic retractable door. They applied for a patent. I never did know whether they actually were issued a patent on it.

At North American I also developed a special hydraulic valve, which I believe, I am quite sure they did patent—had “Patents pending” on it. They sold it later to another company.

And the next patent experience was on this vacuum cleaner that I developed here about 1950, or applied for a patent on it in 1950, and your firm, with Mr. Swayne, have been handling that patent for me.

Q. (By Mr. Hohbach): You filed several patent applications? [133] A. Yes, I have.

Q. Are you familiar with the general prosecution of patent applications?

A. Yes; I believe I am.

Q. Have you studied the Welch patent?

A. Yes; I have.

(Testimony of Eugene L. Grindle.)

Q. You understand the specifications?

A. Yes.

Q. Do you understand the claims?

A. Yes; I do.

Q. Has the defendant admitted a claim——

The Court: I didn't hear that question.

Q. (By Mr. Hohbach): Had the defendant admitted that Claim 1 is invalid?

A. Yes, he did, in an answer to our complaint. He admitted that Claim 1 was invalid, due to public use.

Q. For what reason?

A. Due to public use; it had been in use for more than one year before patent was applied for.

Q. I hand you a soft copy of the patent.

A. Yes; I am familiar with it.

Q. How does Claim 2 differ from Claim 1?

A. Well, in Claim 1, it essentially covers the incorporation of solid blocks in the end of the dipstick to seal it and strengthen the end. In Claim 2 it calls for a block in the [134] end made up of laminated sections, exactly the same shape as the block in Claim 1 but made up of several layers rather than one solid piece.

Q. Do these laminated sections perform the same function as the block shown in your drawing, Plaintiff's Exhibit 8?

A. They do exactly, as far as strength is concerned. It is exactly the same structural characteristic as a solid piece. There is a possibility, if they are not installed carefully, that they may induce

(Testimony of Eugene L. Grindle.)

air pockets in the thing, but if they are installed properly, you end up with a homogeneous mass exactly the same as a solid block.

Q. Did Mr. Welch have access to this drawing before he filed the patent application?

A. Yes, he did. Mr. Welch had access to that drawing early in June, 1948.

Q. How would you make up such a block——

Mr. Naylor: Excuse me, Mr. Hohbach. What drawing are you referring to?

The Witness: Plaintiff's Exhibit 8.

Mr. Naylor: 8.

Q. (By Mr. Hohbach): How would you make up such a block as is shown in your drawing, Plaintiff's Exhibit 8?

A. Well, I outlined a little earlier that there are numerous ways of making a block of that type, and the way you would make them would be more dictated by the production that [135] you would anticipate. The preferred way, in my estimation, in mass quantity, would be to mold it so you would have no work, no hand work whatsoever to do on the block.

In the limited quantities that are involved in this thing, several thousand a year, it would probably be cheaper in the long run to stamp them of thin sheet and laminate them together.

Q. Would you read the language in Claim 2 that makes the difference from Claim 1?

A. On Claim 2 it says:

(Testimony of Eugene L. Grindle.)

“* * * and laminated plugs hermetically sealing the opposite ends of said body and consisting of superimposed layers of sheet material fitting the contours of said ends with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against the ends of said reinforcing bar.”

Q. Now, what is the same language in Claim 1 that calls for that same structure? Could you point that out?

A. Yes; in Claim 1 it says:

“* * * and plugs in the opposite ends of and hermetically sealing the end of said body against the entrance of liquid within said body surrounding said measuring tubes.” [136]

Both claims involve the plugs in the end of the stick.

Q. Claim 2; what does Claim 2 do then? Does it actually——

A. Claim 2 merely installs the plug in laminated layers rather than in one piece.

Q. Does a plug in laminated layers perform the same function as a solid plug?

A. Yes; it does.

Q. What if you just put cement in the end, like in the first dipstick that Mr. Welch furnished?

A. That would also serve exactly the same purpose, as far as strength. The only problem is that

(Testimony of Eugene L. Grindle.)

it would distort the end slightly. They could still be produced that way and be perfectly satisfactory. They are just as functional as putting plugs in.

Q. Is the use of laminated plastics well known to people working in the plastic business?

A. Well, I believe that it is well known to anyone in mechanical work that has worked with plastics at all or even other materials. It don't have to be plastics for an expert to think of lamination or laminating plastics.

Q. Is it your opinion, to form a block of material from several layers of material would merely be a mechanical expedient?

A. I am definitely of that opinion.

The Court: We will take the recess now, [137] gentlemen.

What is your pleasure for tomorrow morning? 9:30 or 10:00? It doesn't make any difference to me.

Mr. Naylor: 9:30 is agreeable.

The Court: 9:30.

(Whereupon, an adjournment was taken until Thursday, February 9, 1956, at the hour of 9:30 o'clock a.m.) [137a]

Thursday, February 9, 1956—10:00 A.M.

The Clerk: Eugene Grindle v. C. Martin Welch,
on trial.

EUGENE GRINDLE

resumed the stand; previously sworn.

Direct Examination

(Continued)

By Mr. Hohbach:

Q. Mr. Grindle, I hand you Plaintiff's Exhibit 2, which is a soft copy of the Welch patent.

Mr. Grindle, have you finished telling us how Claim 2 would differ from Claim 1 yesterday afternoon?

A. Well, I believe that I fairly well finished that, but, if I may, I will review briefly what I think the difference is.

Q. Why don't you do that?

A. Well, in Claim 1, the claim centers around the end plugs. It calls for inserting plugs in the opposite ends and sealing the ends to the body of the dipstick. And Claim 2 calls for plugs consisting of superimposed layers of sheet material other than a solid plug, and sealing the plugs to the body of the housing. That is essentially the difference in 1 and 2.

Q. Did you state yesterday afternoon whether you thought that amounted to invention?

A. I stated that I didn't think it did; but that would be a common shop practice to substitute laminations for a solid [138] plug.

(Testimony of Eugene L. Grindle.)

Q. How does Claim 3 differ from Claim 1?

A. Claim 3 is similar to Claim 2 in that it calls for superimposed layers of plastic and cemented to the body of the dipstick and then calls for drilling a hole through the center of these plugs and driving a nail through the laminations into the wood to hold the laminations in there while the cement is hardening.

Q. How does it actually differ from Claim 2, then? Can you tell us that?

A. Well, it differs from Claim 2 only to the extent that they drive a nail—drill a hole and drive a nail through the plastic laminations into the wood. And it says that the purpose of this nail is somewhat of a dual purpose: One, to hold the dipstick off of the bottom of the fuel tank and prevent sediment from getting into the dipstick, and it also serves the purpose of holding the laminations together.

Q. Where did you find that information?

A. Well, it is in the specifications primarily.

Q. Has Mr. Welch within your knowledge ever manufactured and sold such a dipstick?

A. I don't know if Mr. Welch has ever manufactured a dipstick with a nail in it, but I could just about guarantee that he would never sell one if he had.

Q. Why wouldn't he be able to sell it? [139]

A. Well, there are several reasons. One is that if the nail was in the bottom of the stick, of course, the graduations would have to be placed in the stick

(Testimony of Eugene L. Grindle.)

with respect to the nail in the end. Also wherever Mr. Welch got the idea that there was sediment in the fuel tank, he was completely misinformed because there is no such thing. Fuel tanks are very clean all the time. They have to be. The fuel is filtered numerous times before it gets into the tank through micronic filters, water separators; we have very fine screens in the fuel system in the airplane, and if there were any sediment whatsoever in a fuel tank, it would be way at the inboard end and not up at the outer end where the dipstick is used.

Q. Is there any objection to the use of a nail?

A. The objection to the use of a nail is that it would be completely prohibited on an airplane because of the fact that a spark could ignite and blow up the airplane.

Q. If the nail did perform a useful function, would the use of a nail in this manner amount to invention?

A. I think the use of a nail to hold a laminated structure is very common throughout all trades and wouldn't consist of an invention, in my estimation.

Mr. Hohbach: Your Honor, that concludes the direct examination of Mr. Grindle.

The Court: Cross-examine, Mr. Naylor. [140]

(Testimony of Eugene L. Grindle.)

Cross-Examination

By Mr. Naylor:

Q. I understood you to say yesterday, Mr. Grindle, that you had a familiarity with patents.

A. Somewhat, yes.

Q. What do you mean, "somewhat"?

A. Oh, for about the last twenty years or more I have studied patents to some extent, had some close association with them with my father and with my own work later.

Q. I understood you to say yesterday that you were familiar enough with patents to know that the inventor had to sign an oath; is that correct?

A. I don't know that he had to sign an oath; I know that you have to swear to an oath and that you sign the application.

Q. And that an oath had to be made?

A. Correct.

Q. Now, I take it from that that you have executed personally one or more patent applications?

A. Yes, I have.

Q. How many have you executed?

A. Three.

Q. And when was the first one?

A. The first one was about 1939.

Q. And when was the last one?

A. The last one was 1955. [141]

Q. And I take it that you carefully read the oath before you made it? A. Yes, I did.

(Testimony of Eugene L. Grindle.)

Q. In connection with each of those applications, did you not? A. Yes, I did.

Q. Are you familiar with the recitals in the statutory patent oath?

A. I know that the oath was read to me and I swore to it, if that is what you mean.

Q. And did you read the oath forming a part of the first patent application that you executed or was it read to you?

A. It was read to me, as I recall.

Q. I direct your attention to Plaintiff's Exhibit 1, which is the file history of the Welch patent application, and specifically to page 8, and calling your attention to lines 16 to approximately 19, I will ask you if you will read that, please?

A. Do you want me to read this aloud?

Q. No; I just want to ask you to read it, and then when you have read it I would like to ask you if you see a reference in that oath to an affirmative statement that the invention has not been in public use or on public sale for one year prior to the filing of the application.

A. Would you repeat that question? [142]

Q. After you have read the part of Plaintiff's Exhibit 1 to which your attention has been directed—— A. Yes.

Q. ——I would like to ask you to answer me as to whether you find in that oath an affirmative allegation that the invention has not been in public use or on public sale for more than one year prior to the filing of the application.

(Testimony of Eugene L. Grindle.)

A. I don't see any reference to—yes, I do.

Q. You do?

A. I see that it says that it wasn't—whoever was going to swear to this oath stated he did not know prior to one year that it had been in use.

Q. No; you were familiar with that as early as 1939, were you not? A. With this oath?

Q. Yes.

A. I was familiar with that oath as early as 1934.

Q. In what way?

A. In that my father had taken out many patents in my presence. I worked very closely with him.

Q. And I assume——

A. I accompanied him when he visited his attorneys on several occasions.

Q. Now, I assume that as early as 1934, then, you were aware of the fact that it was necessary to make such an oath [143] in connection with a patent application? A. Yes; I was.

Q. And, of course, you were aware of it on June 10th, 1948, were you not? A. Yes; I was.

Q. Now, in that connection, when were you first aware of the fact that Mr. Welch had delivered a quantity of dipsticks to Pan American and that Pan American had put those dipsticks into use?

A. On August 12, 1948.

Q. And there is no doubt about that, is there?

A. No doubt whatsoever.

Q. It was August 12th, 1948?

(Testimony of Eugene L. Grindle.)

A. Absolutely.

Q. Now, with those statements in the background, how do you explain the fact that you did not assert your patent rights, if any, within the one-year period that was called for in the patent statute by that oath?

A. It is my understanding that there is no compulsion on the part of an inventor to file an application on an invention.

Q. No compulsion? A. No compulsion.

Q. Is it your understanding that you, as an inventor, can sit by more than the one year when you, personally, know that the device has been in public use and still make an application? [144]

A. Not in its original form, but perhaps in an improved form.

Q. But not in the original form?

A. Not in the original form.

Q. There is no doubt in your mind about that, is there? A. No; there is not.

Q. Now, the truth of the matter is you never did file an application? A. That is correct.

Q. On what you believed to be your invention on a dipstick? A. That is correct.

Q. Why didn't you file an application?

A. I have, Mr. Naylor, probably designed ten thousand items in my life on which I have not filed for a patent and which I felt were invention.

Q. And for various reasons?

A. And for various reasons.

Q. What was the reason for not filing an ap-

(Testimony of Eugene L. Grindle.)

plication on the dipstick which you believed to be your invention?

A. Well, there is no doubt in my mind at all as to what it was in this case; it was from my financial position. I did not have money to file for a patent on anything at that time. [145]

Q. And for that reason you did not file?

A. That was undoubtedly the main reason.

Q. Did the idea of filing an application on the dipstick cross your mind at any time in the one year in which you knew that public use was running against any claim that you might have?

A. The idea of filing patent applications goes through my mind frequently; I wouldn't say daily, but perhaps many times in a year's period, because my mind is—well, I am in the process of inventing many things.

Q. I take it from the statements that you have made that you have filed very few applications; is that correct?

A. Yes, I have. I have to—I don't think that anyone just files applications on every idea that comes to their mind.

Q. But in your case it is a very small percentage of the ideas that come to your mind; is that correct?

A. In my case, it is.

Q. Now, was there any other reason for not filing an application for letters patent on what you believed to be your invention in a dipstick?

A. Any other reason?

Q. Yes; other than financial.

(Testimony of Eugene L. Grindle.)

A. No; the only other procedure for me would have been that if I had intended to file a patent, I would have requested permission from my [146] company.

Q. Is that the usual procedure?

A. Pan American, you mean?

Q. Yes. A. Yes.

Q. You would have requested and would have received in writing a waiver in your favor to permit you to file such an application, would you not?

A. I would have requested permission, and they would have considered first whether they were interested in patenting it, and, if not, I would have been given a release on the idea.

Q. And, as I understand it, you made no such request of Pan American in this particular instance? A. That is correct.

Q. At any time within the one year on which you knew that the public use statute was running; is that correct? A. That is correct.

Q. And at no time after the running of that one-year statutory period did you make such a request of Pan American? Is that correct?

A. I made no request from Pan American until such time as this litigation started, and then I asked them for a release.

Q. That was not a request for release to you to file an application, was it?

A. No; that was a request relinquishing any rights that Pan American might have. [147]

(Testimony of Eugene L. Grindle.)

Q. And that is the release that you mentioned yesterday? A. Yes.

Q. Now, I would like to ask you, Mr. Gindle, just what was your attitude toward any invention rights that you may have thought you had in the dipstick as of June 10th, 1948?

A. There was no question whatever of the attitude in my mind regarding a dipstick; that was, it was solely my invention, my design from its inception. The basic idea of a calibrated scale enclosed in plastic with a liquid column to be supported by a finger placed over the top of the tube and read the fuel level by the level in this tube, and to seal the ends to protect this calibrated scale in this stick—that this conception was mine, unquestionably. The detailed design of the stick in question in this suit was my design, and I was furnished nothing but the plastic extrusion. That is all that I asked to be furnished, and the detailed design of that stick was entirely my own.

Q. And yet you abandoned all idea of ever asserting that right, didn't you?

A. I didn't think any right was in question at any time.

Q. Now, did you assert this right in any way prior to the first letter that you called your lawyers to write to Mr. Welch?

A. Mr. Naylor, myself and practically every engineer that I know has invented many things, designed many things which [148] has been his basic conception. They don't run out and file a patent ap-

(Testimony of Eugene L. Grindle.)

plication on every little thought that runs through their mind. And many of those items they, themselves, have put into production and sold, facing the fact that even though it is their design, they may sell it in competition with somebody else because they have not exerted their rights to possible patent.

Q. Now, did you assert to anyone the claim that you have just repeated here; that there was no question but what the invention was yours?

A. Oh, I have asserted that numerous times. There was an engineering group at Pan American consisting of some 30 to 40 engineers, every one of which was familiar with the fact that I had invented or designed this dipstick and it is quite clear in all their minds to this day that it was my design.

Q. When was this assertion made?

A. From the day that I started working on the dipstick project out there very early in the year of 1948 until we purchased them from Mr. Welch there was periodic discussions. They saw me working with dipsticks. It was quite familiar to everyone, in not only verbal assertions but in evidence in the engineering department that I had designed—was designing this dipstick.

Q. You mentioned specifically the assertion of it to a group of engineers. When was that assertion made? [149]

A. I made no mention of a specific assertion. I said that it had been asserted on numerous occasions both verbally and in evidence.

(Testimony of Eugene L. Grindle.)

Q. Now, as early as June 10th, 1948, you were aware, were you not, that Mr. Welch was the only manufacturer of the dipstick that has been indicated here in several forms; is that not correct?

A. It was my opinion that he was the only manufacturer; I don't have any indication otherwise.

Q. It was your belief? A. Yes.

Q. That he was the only manufacturer. Now, from inception of Mr. Welch's delivery of dipsticks to Pan American, you have been aware, have you not, that his name has been on the paper portion of the chart—calibration chart section of the dipsticks with the designation that he was the manufacturer?

A. Yes; I was.

Q. And how early were you aware of that fact?

A. Oh, perhaps prior to Mr. Welch delivering the dipsticks he in some conversation some time or other said he was going to stamp, "Manufactured by C. Martin Welch & Company." I have never disputed the fact that Mr. Welch manufactured them; he just manufactured them to our design.

Q. And he manufactured them to the specifications of other airlines, too, did he not? [150]

A. Well, I have no knowledge of that, Mr. Naylor. All I have knowledge of directly is that he manufactured to the Pan American specifications, and I am sure that they were not manufactured for any other airlines for some time after Pan American's first orders.

Q. Yes. But you did become aware of the fact, did you not, that after the initial order and delivery

(Testimony of Eugene L. Grindle.)

to Pan American, that Mr. Welch was manufacturing for other airlines?

A. Mr. Welch on several occasions made long distance calls to me from Dayton, Ohio, and from New York, too, that I can recall, where he requested technical information from me regarding the dipstick and I assumed that he was in the process of selling to other people and that he may have been successful.

Q. Now, didn't you have more direct knowledge of it than that?

A. More direct than that?

Q. Yes. A. I can't say that I did; no.

Q. Were you never in his home?

A. Yes; I was in his home.

Q. Were you ever in his workshop?

A. Yes; I was in his workshop.

Q. And isn't it a fact that the dipsticks for other airlines were being assembled in his workshop—— [151]

A. Not to my knowledge.

Q. ——and that you saw them there?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No, sir. I have a very good recollection of the date I was last in Mr. Welch's home.

Q. But it does boil down to this: That you were aware of the fact that Mr. Welch was manufacturing and selling the dipsticks to other airlines?

A. I think that I can say definitely that I was aware that Mr. Welch was selling dipsticks to the

(Testimony of Eugene L. Grindle.)

Air Force. I don't believe I ever saw any of them, but Mr. Welch showed me a purchase order for—a request for quotation or something from the Air Force. I can remember that the amount was in the neighborhood of \$10,000 for the order.

Q. Now, you were satisfied, were you not, to see Mr. Welch put his name on the stick as the manufacturer?

A. I had no objection. He was the manufacturer.

Q. And you never raised any objection to him putting his name on the sticks as manufacturer?

A. Mr. Welch was the manufacturer. I would have no ground for objection and I had no thought of objecting to it.

Q. And you did not object, did you?

A. I did not object.

Q. Now, I would like to ask you a few questions about your [152] friendship with Mr. Welch. Over what period of time did that extend?

A. It extended from the time that Mr. Welch and I first met on the occasion of my calling him and he came to my office.

Q. That was approximately when?

A. That was in May of 1948, and our friendship ceased in February of 1951.

Q. February of 1951? A. That is correct.

Q. And by ceasing, are we to understand that you did not see him socially after that time?

A. That is correct.

(Testimony of Eugene L. Grindle.)

Q. Now, I gather that you had made one or more visits to Mr. Welch's home?

A. Yes; I believe I mentioned to you once before that I have made six to eight visits to Mr. Welch's house.

Q. Six to eight visits?

A. In that neighborhood.

Q. And his home is in Millbrae, is it not?

A. His home is in Millbrae.

Q. It is back toward the Skyline section of Millbrae, is it not?

A. Yes; I still know where it is.

Q. And did you observe on the occasion of any of those visits that Mr. Welch had a workshop in his home? [153]

A. Yes; I did.

Q. And it is a fact, is it not, that the workshop was a sort of a jerry-built thing on the occasion of your first visit?

A. On the occasion of my first visit to Mr. Welch's home he did not have a workshop; he had a basement. There weren't any tools or anything in it.

Q. When did you first observe that he had installed a workshop?

A. First observed that he installed a workshop?

Q. Yes.

A. You mean actual construction of a shop or something?

Q. Yes. A. I have never observed that.

Q. You have never seen a workshop in his residence?

(Testimony of Eugene L. Grindle.)

A. I have seen the racks where he put plastic and some things where he—a chair that he had in there, and on the occasions of some of the visits when he was making our dipsticks that he sat in the chair when he plugged the ends of these dipsticks. As far as any tooling or equipment, I have never seen it in Mr. Welch's shop.

Q. I didn't say anything about equipment, Mr. Grindle.

A. Well, what is a workshop, Mr. Naylor, unless it has some equipment in it?

Q. Well, I assume from what you say that at the place where Mr. Welch was he was doing work, was he not? [154]

A. Yes; he was.

Q. And how many times did you observe him doing work in that particular portion of the premises?

A. I never actually observed Mr. Welch doing any work. He took me down to the basement on only one occasion on which he actually took a dipstick and showed me how he was doing it. It was not the purpose of observing him in work. And on one other occasion when I was in his basement, he took me down there and he had two school boys assembling the dipsticks for him.

Q. And did you observe the high school boys working on the dipsticks?

A. From a distance, I did.

Q. On the occasion of any of these visits did you pick up dipsticks or parts of dipsticks in the workshop or the work area of Mr. Welch's home?

(Testimony of Eugene L. Grindle.)

A. I undoubtedly did pick up parts of dipsticks and possibly a completed dipstick.

Q. And I assume some conversation ensued between Mr. Welch and you?

A. I had considerable conversation with Mr. Welch. I am sure he would recall that I expressed dissatisfaction with the way he was feeling the ends, not being in accordance with the drawing, and so forth, and that I would like to see him do that. And he explained the difficulty of making [155] such plugs and so forth, the tolerances on the extrusion were such that he couldn't make standard plugs and things like that. And I had conversations with him about that aspect.

Q. You were aware, then, I take it, that there was a problem in getting an effective seal for the ends of the dipsticks, were you not?

A. I was not aware that there was a problem; I was aware that Mr. Welch was having a problem.

Q. Well, I'll take that. You were aware that Mr. Welch was having a problem?

A. And I was aware also of the fact that it was because of Mr. Welch's mechanical aptitude.

Q. I see. Now, part of the time of this period of friendship, were you unmarried?

A. Yes; I was.

Q. And you had a lady friend, Miss Margaret Simpson, did you not?

A. That is correct.

Q. And did Miss Simpson accompany you on any occasion to the Welch home?

A. Yes; she did. I don't recall that I ever visited

(Testimony of Eugene L. Grindle.)

Mr. Welch's home alone; I might have, possibly, but usually Miss Simpson was with me.

Q. And did Miss Simpson and you ever accompany Mr. and Mrs. Welch on any trips? [156]

A. Yes; we did.

Q. How many trips? A. One.

Q. And where?

A. To the Sonoma Mission Inn. I would like to say that we had separate rooms.

Q. Now, some time in that period of friendship you were married, were you not?

A. In May of 1950 I moved from San Francisco to an apartment in Burlingame. During the week, the following Saturday, I broke off with Miss Simpson. From that time until Mr. Welch was invited to my wedding reception in December, I did not see Mr. Welch socially.

Q. Did you see him socially after you were married?

A. I saw Mr. Welch socially after May of 1950 for the first time in December when he was invited to my home to a wedding reception along with about 120 other guests.

Q. Now, after that reception?

A. After that reception, a week or two weeks after that reception, Mr. Welch called on us and presented us with an electric blanket, and at the same time invited my wife and myself to dinner at his home.

Q. And did you go to his home on that occasion?

A. Yes; I did.

(Testimony of Eugene L. Grindle.)

Q. And approximately when was that? [157]

A. That was some time in January of 1951. I then returned that invitation and had him to dinner in my home, and that was the occasion of our last social visit.

Q. Now, on the occasion of your last visit to Mr. Welch's home, did you have any conversation with him concerning dipsticks?

A. None whatsoever.

Q. None whatsoever? A. None.

Q. Did you go to his basement?

A. My wife has reminded me that I did not. It was the first time she had been in his home and she recalls Mr. Welch going down to his basement and bringing up his dog.

Q. Did you observe on the occasion of that visit any dipsticks? A. No; I did not.

Q. In Mr. Welch's home? A. I did not.

Q. Now, going back to the time when you admit seeing in Mr. Welch's home dipsticks in the process of assembly or the parts ready for assembly, did you observe the various parts of the dipsticks?

A. Yes; I did.

Q. And did you observe in particular the calibration charts, the paper portion of the [158] dipstick?

A. Yes. I have told you this before: That the only calibrations that I have ever observed in Mr. Welch's home were those that I had printed and given to him myself for our dipsticks, because my interest in dipsticks was from Pan American's

(Testimony of Eugene L. Grindle.)

standpoint. I don't recall ever seeing another calibration other than Pan American's.

Q. At any time? A. At any time.

Q. Other than the exhibits that had been introduced in this case?

A. Oh, yes; I have seen them since. I have noticed other operators to see that the patent number was on there since the time this litigation was started.

Q. Yes. But, as I understand it, you did not observe the sticks or the calibration chart portions of the sticks—— A. No; I did not.

Q. Except a chart that was intended for a Pan American order? A. That is correct.

Q. That is correct? A. That is correct.

Q. Now, is it your assertion that you never saw a stick made by Mr. Welch which bore the notation, "Patent Pending"? A. Never in my life.

Q. You never did? [159] A. Never did.

Q. And it is your assertion that the first time you ever saw a patent number on a stick manufactured by Mr. Welch was on the occasion of the Burfein test, is that correct?

A. That is correct.

Q. And that was when?

A. That was September 28, 1953.

Q. Now, after this incident during the test by Mr. Burfein, we understand from your testimony yesterday that some time later you mentioned the matter of the dipstick casually while talking with

(Testimony of Eugene L. Grindle.)

your patent counsel on other matters; is that the substance of your testimony?

A. I don't say casually. I believe that I mentioned the dipstick situation to my patent counsel at the time that Pan American still had the entire situation under advisement. They had still not advised me that they were not going to take action against Mr. Welch.

Q. When was this?

A. It was many months after this thing had come up on September 28th, '53, before Pan American had advised me that they were not going to take any action against Mr. Welch and that I could pursue the patent situation myself.

Q. Well, I would like to clarify that, if I may. When was this conversation with patent counsel?

A. It would be hard to say; I would say that it was in the [160] very early part of 1954.

Q. Early part of 1954. And where was this?

A. In the offices of Flehr & Swain, my attorneys.

Q. And with whom in that firm were you talking?

A. Mr. Hohbach.

Q. And what were the other matters that were being discussed at that time?

A. Well, I was in the office at the time for the purpose of going over some action on a patent that I had in process. It was a Patent Office action.

Q. Some other device than the devices involved here?

A. That is correct.

(Testimony of Eugene L. Grindle.)

Q. Now, was it this conversation that led to the letter that was written to Mr. Hohbach?

A. Not that particular conversation, because I did not have the file with me at that time; but they said they would like to see the file and see what action would be called for. I brought that file in at some later day and then the letter to Mr. Welch was written.

Q. How much later, Mr. Grindle?

A. I don't recall. I believe that we could probably pin that down pretty closely by the date of the letter written to Mr. Welch, I imagine.

Q. That was October 15, 1954, wasn't it?

A. Was it? I don't recall the date of that [161] letter.

Q. Would you like to verify it? I have the letter here.

A. It would be a good idea.

Q. Just for the purpose of fixing the date, I will show you what we understand to have been the original letter from Mr. Hohbach to Mr. Welch.

A. Is this the original letter, Mr. Hohbach? I can't say that that is the original letter.

Q. Well, you don't deny that letter was written on October 15th?

A. No; there were several letters written.

Mr. Hohbach: Your Honor, I will stipulate that that is the first letter that was written by us to Mr. Welch.

The Court: Very well.

Q. (By Mr. Naylor): Now, if the conversation with Mr. Hohbach was in the early part of 1954,

(Testimony of Eugene L. Grindle.)

what was done on this matter between early 1954 and the letter date of October 15, 1954?

A. Well, first of all, during this time Pan American was making their investigation into the possible overcharges and determining whether or not they had any recourse or were going to take any action against Mr. Welch, and at such time as they advised me that they weren't and that the patent recourse would be up to me, I then at some time after that took the file to my attorneys and they started their action. I believe one of the first things they did was to write to [162] get a copy of the patent, studied the patent; I studied the patent and we had a few discussions about it. One of the main reasons for delay was the fact that I realized any litigation in this thing was going to cost me money. I did not have much money. I work for a small salary and until such time as I felt I was able to handle the expense of a lawsuit, I was a little reluctant to go ahead, but finally I asked them to do that.

Q. You finally authorized Mr. Hohbach to proceed?

A. That is correct.

Q. You mentioned a moment ago that during part of that time, from the early part of 1954 to the October 15, 1954, letter, that Pan Am was making its inquiry as to whether or not it had any grouse or complaint to Mr. Welch; is that correct?

A. The way you phrase it is not correct.

Q. Well, set me right. I don't want to mislead you.

(Testimony of Eugene L. Grindle.)

A. Pan American's sole interest in the matter was related to the agreement that I had negotiated with Mr. Welch for Pan American in which Mr. Welch stipulated he would sell Pan American dipsticks in the future for \$5.00 each. Their only interest in the matter was the amount that Mr. Welch had charged over that \$5.00 and the manner in which he had done it, to see if Pan American had any recourse to recover the overcharges. [163]

Q. That is your version of their inquiry?

A. That is my version, which has been affirmed by the Pan American officials involved.

Q. All right. Now, accepting your version of it, when did that inquiry begin and when did it end?

A. That inquiry began in late 1953 and it ended several months later. Pan American officials are busy people; they don't stop everything they are doing to act on something as minor as this.

Q. Isn't it a fact, Mr. Grindle, that Pan American declared itself on that in the manner in which you stated yesterday within just a matter of days after the first question was raised?

A. Absolutely not.

Q. Aren't you aware of the fact that Mr. Fox told Mr. Welch that Pan American had no complaint about what was going on?

A. I am aware of exactly what Mr. Fox has said. I have discussed this with Mr. Fox recently; I know what Mr. Fox said.

Q. Now, let's fix the time on it, because the time is important. When did Pan American first make

(Testimony of Eugene L. Grindle.)

an inquiry about this and when did it declare to Mr. Welch that Pan American had no complaint to make to him?

A. I mentioned in my testimony yesterday that at some time [164] during Pan American's investigations, some time after I had initiated their investigation in October, 1953—it could have been anywhere from one to two to three months after that—Mr. Fox called Mr. Welch into the office and discussed it with him, and Mr. Welch said that he would go to Los Angeles and get what he considered the original drawing of this dipstick, which he returned with a week or so earlier, and gave three copies of that to Pan American, in the company of Mr. Fox, Mr. Kiester and I believe Mr. Boyle. And he said, "Now, this is the original drawing." That was the drawing made by me. I would like to say that that was Plaintiff's Exhibit 4, I believe—and that the drawing, Plaintiff's Exhibit 8 was not the original drawing. Now, Mr. Fox—

Mr. Hohbach: Your Honor, may we correct that so we will know what the witness is testifying about? Actually, the first drawing made by Mr. Grindle is Plaintiff's Exhibit 6.

The Witness: Excuse me.

Mr. Naylor: Thank you.

The Witness: Mr. Fox said that on his last visit with Mr. Welch he made a statement that if the facts were as Mr. Welch presented them, it might throw a different light on the story. That was the way he phrased his parting words with Mr. Welch, but that by no means ended Pan American's in-

(Testimony of Eugene L. Grindle.)

vestigation. That was more the beginning of Pan American's [165] investigation.

Q. (By Mr. Naylor): All right. When did it end, according to your understanding?

A. Pan American's investigation ended, the shops had made their cost studies and determined—turned that over to Mr. Boyle to determine whether or not Pan American would be—would want to make these dipsticks themselves. They decided they did not and at that time said that I should go ahead with any patent interests that I might have. Now, I can't say exactly what date that was, Mr. Naylor.

Q. But Mr. Welch had no part in this cost survey that was conducted, did he?

A. Mr. Welch?

Q. Yes.

A. He possibly did. They might have asked him for materials or something like that.

Q. That was an internal survey, was it not?

A. The internal survey as far as labor was concerned, was internal, yes. Undoubtedly Pan American would have to purchase materials from Mr. Welch's company; the Plastic Process Company was the only company in the West that makes that square extrusion.

Q. Isn't it a fact, Mr. Grindle, that Mr. Fox communicated his sentiments and his decision to Mr. Welch as early as 1953? [166]

A. Not to my knowledge. I can't recall exact dates, but what you are talking about, "his sentiments"—Mr. Fox believes he has been misquoted

(Testimony of Eugene L. Grindle.)

and is willing to come in here and refute these statements attributed to him.

Q. Well, isn't it a fact—whether I used the term “sentiment” in correct connotation or not is of no moment, but isn't it a fact that Mr. Fox—that Mr. Fox's inquiry as a result of your initiating it concerning this matter of price was a very short lived thing and it required but two visits by Mr. Welch to bring it to an end as far as Mr. Welch was concerned? [167]

A. Mr. Naylor, Mr. Fox's investigation into this matter, as far as Mr. Welch was concerned, was purely to look at the legal aspects as to whether or not Pan American had recourse to recover overcharges, and because Mr. Welch notified Pan American each time that he increased the price and our purchasing department issued a purchase order based on the price quoted with the increase, Mr. Fox considered that tacit approval of Pan American Airways for the increase and that we had no recourse to recovery overcharges. That was the end of Mr. Fox's interest as far as Mr. Welch was concerned, but that did not end Pan American's investigation as to whether they might be interested in manufacturing the sticks for their own use.

Q. All right. I will come back to my question now: That the inquiry by Mr. Fox was a very short affair and began after you had initiated with Mr. Fox, with the request by Mr. Fox that Mr. Welch come down there, which he did, and then he made a trip to Los Angeles and came back and brought

(Testimony of Eugene L. Grindle.)

you believed to be a complaint that Pan American might have and the question of your own personal patent interests; is that true? [170]

A. That is correct.

Q. In that initial conversation did you discuss with Mr. Fox the June 10th, 1948, letter that you authored?

A. That letter was given to Mr. Fox, it was part of the file, and it was discussed.

Q. It was. Did you tell Mr. Fox at that time anything about the development work that Mr. Welch had been doing on this stick?

A. To my knowledge, Mr. Welch never had done any development work. I would not discuss that with anyone. He didn't do any development work as far as I was concerned. To this day he hasn't done any development work on the dipstick, except if you call the color code that he has put on the stick a development. That is a common practice, has been in aircraft for years and years to put on a color code to distinguish materials.

Q. Is it your statement that Mr. Welch did nothing to make a better stick?

A. Mr. Welch over a year or so's period, finally was able to manufacture a dipstick that was in accordance with my original drawing. He was finally successful in being able to build a stick to that drawing. My production people, when I started building dipsticks, turned out a dipstick in a matter of an hour after I asked them to put one together, making the end plugs, and putting them in

(Testimony of Eugene L. Grindle.)

and sealing them [171] and having it ready for test in one hour.

Q. It was that simple, was it?

A. It has always been that simple. I will say that it takes a few tools and a little mechanical aptitude.

Q. That prompts me to ask, what experience have you actually had in plastics and plastic compositions? A. Me?

Q. Yes.

A. I have done considerable plastic work primarily in my assignments with the Air Forces around the world where we have had to make jerry rigs of plastic parts, primarily windows and windshield structures, where you don't have a spare window available we take the old one out, make a simple mold for it or a simple jig and laminate the window out of whatever plastic materials are available to build in a hand-made manner the structure that we are trying to replace.

I have also made my own—all of my own plastic drafting instruments of various shapes and sizes that are not available on the market. I have manufactured and been selling these plastic covers for the vibrometer for several years.

Q. Did you ever take any courses in plastics?

A. I have never actually taken any formal courses in plastics, but we have a very substantial plastic technical library at Pan American, where Pan American is—the [172] library, engineering library is kept in very up-to-date fashion. We have

(Testimony of Eugene L. Grindle.)

—we are on the mailing list for Modern Plastics distribution. We have a man in our engineering department who is an extremely well qualified chemist and very familiar with plastics, solvents and chemical compositions for personal advice if we need it.

Q. If you need it? A. If we need it.

Q. Now, do you profess to be skilled or learned in the chemistry of plastics?

A. You mean as far as the plastic profession is concerned?

Q. Yes.

A. Oh, no; I consider myself a layman in the field.

Q. Now, I take it that you were in court yesterday when Mr. Hohbach made his opening statement in your behalf? A. Yes; I was.

Q. And do you recall him saying in effect that, "Mr. Grindle takes the position that the release is no longer in effect due to the breach of the price agreement"?

A. I believe I can recall saying something like that.

Q. Now, is that your position before this Court?

A. That the agreement that Pan American negotiated with Mr. Welch is no longer in effect?

Q. Yes.

A. From a moral standpoint, it is not. [173]

Q. Now, you take this position despite the fact that Mr. Fox closed the door on it; is that true?

A. Mr. Fox has not closed the door on it by any means. Mr. Fox has given me a release of the dip-

(Testimony of Eugene L. Grindle.)

stick so that I can pursue it any way that I choose.

Q. Well, that relates to your asserted invention, does it not, Mr. Grindle; that has nothing to do with price?

A. As far as price is concerned, Pan American has decided that they could not—well, actually, I know what they said they could produce dipsticks for themselves. They didn't think it was enough lower than Mr. Welch to bother to do it. They have retained shop rights if I should license or manufacture these dipsticks myself—not if I manufacture them, but if I should license someone else to manufacture them and I should receive a royalty, they would get them royalty free from me.

I don't exactly get your question, what you want me to answer.

Q. Well, I say it is your position before this court—your personal position before this Court—that the release of June 10th, 1948, is no longer in effect because of an asserted breach of some price stipulation?

A. That is my personal opinion.

Q. And it is your personal position along that line despite the fact that Mr. Fox has washed his hands of the price [174] factor and consideration, is it?

A. Let me make clear once again, Mr. Naylor, that Mr. Fox's position is that Pan American, because of their tacit approval of the increase, can no longer legally or would they be willing to spend the necessary legal time, to try to make Mr. Welch hold to that original agreement.

(Testimony of Eugene L. Grindle.)

Q. In other words, Mr. Fox has shut the door on the price inquiry? A. Yes.

Q. And notwithstanding that, it is your position——

A. Mr. Fox, you understand, is acting purely in the legal aspects for Pan American. There are other management officials out there that I wouldn't say have necessarily washed their hands of the price picture.

Q. But notwithstanding Mr. Fox's position, it is your assertion before this Court that the June 10th release to Mr. Welch is no longer in effect; is that right? A. That is correct.

Q. Now, was the——

A. It undoubtedly is correct, because our knowledge and our advice to other divisions was that Mr. Welch would sell to Pan American for \$5. Obviously, that isn't in effect any more; he has been charging twelve fifty.

Q. Now, let me ask you, was that agreement with you?

A. That agreement was negotiated personally with Mr. Welch and myself, but I had no authority in my position [175] to make that agreement. I authored the agreement and had it executed by my superiors.

Q. But you had no personal part in any such agreement, did you? A. Mr. Naylor——

Q. Were you a party to that agreement?

A. Was I a party to it?

Q. Yes. A. Officially?

(Testimony of Eugene L. Grindle.)

Q. In any way. Were you, personally, a party to that agreement?

A. Naturally I was personally a party to it. I authored it, and I explained to my superiors the purpose of it, and I recommended that it be done so that Pan American could get the advantage of price consideration.

Q. Well, if you were a party to it then, the release was from you, personally, as well, wasn't it?

A. I do not have the authority to release the thing for Pan American. The purpose of the agreement, or of the release, as you call it, was to permit Mr. Welch to sell the dipsticks to other operators, in return for which Pan American would get a price consideration. As far as price consideration was concerned, I was acting purely in the interests of Pan American Airways; I wasn't getting anything from it personally.

Q. And yet you say you were a party to the so-called [176] price agreement?

A. Mr. Naylor, I had to be. I was the only one at Pan American Airways that Mr. Welch dealt with. He asked me for it and I took the necessary steps to give it to him. To that extent, I was a party to it.

Q. Don't you mean by that, though, Mr. Grindle, that you personally negotiated it on behalf of Pan American if there was such an agreement?

A. Yes.

Q. That's what you are saying?

A. Yes; I negotiated it.

(Testimony of Eugene L. Grindle.)

Q. So that your position before the Court is inconsistent with the position of your employer with respect to the June 10th, 1948, agreement?

A. In what respect?

Q. Your employer has washed his hands of the matter and you still pursue it?

A. My employer—I would like to change the words “washed their hands of it”; they said that because of the fact that another department, our purchasing department, authorized, without sanction or without knowledge of this agreement—and that, unfortunately, was my mistake, but our purchasing department authorized the increase; therefore, we had approved the increase.

Q. And that’s where the matter rests? [177]

A. That’s where the matter rests as far as legal recourse in holding Mr. Welch to that original agreement.

Q. You are not in this action then complaining about that which your employer has no complaint, are you?

A. Mr. Naylor, I am in this action because Mr. Welch is charging so much for the dipsticks that—and preventing other people from manufacturing and selling this item by having a patent on it, and I am interested in going the manufacturing of these dipsticks myself and selling them. That’s why I’m here.

Q. So then we have three reasons why you are here: One, he is charging a high price for his sticks; number two, you say the patent has prevented other

(Testimony of Eugene L. Grindle.)

people from going into the manufacture; is that right?

A. Number one, I am here not because Mr. Welch is charging a high price for the dipsticks; I am here because he is charging a price much higher, more than twice the amount, that I negotiated with him, and he has deviated and completely abandoned an agreement that I negotiated with him. And I consider that it was more or less of a personal thing between us at the time because I was doing everything I could at that time to help Mr. Welch get started. He had made many complaints about not being able to feed his family properly, his car wouldn't operate, it used to break down; he has had to borrow other people's automobiles just [178] to come out to Pan American. I, to some extent, felt sorry for him.

He was very humble in his negotiations with me, and I tried very hard to help him get started, and I felt that we had more or less of a personal agreement, that for all this help in giving him the design that he was going to give Pan American this price consideration.

Q. Now, it is a fact, is it not, as you testified yesterday, that the dipsticks produced by Mr. Welch are very efficient?

A. Efficient?

Q. Yes.

A. Well, without taking too many bouquets, I would say they are. It is my design, and it works very well.

(Testimony of Eugene L. Grindle.)

Q. And it is a fact, is it not——

A. It also has deficiencies.

Q. Well, let's talk about its efficiencies for a moment.

A. Fine.

Q. I will accept your testimony of yesterday that the device is highly efficacious for its purpose. Is that correct?

A. If the user is properly indoctrinated in its use.

Q. All right. We will assume that he is.

A. All right.

Q. It is also a fact, is it not, that the price charged by Mr. Welch is considerably less than the so-called [179] competitive dipsticks of Boeing and the other concerns?

A. No, some competitive dipsticks. There are dipsticks on the market cheaper than Mr. Welch's.

Q. Could you name one, for example?

A. Yes; Roylin makes one for \$5.

Q. What is it?

A. It is just an aluminum tube with calibrations on it painted black.

Q. And that is a surface reading stick, is it not? In other words, you read where the fluid was?

A. That is correct.

Q. At the greatest point of immersion?

A. Correct.

Q. Right? A. Correct.

Q. In other words——

A. Similiar to the old wooden type that we discussed yesterday.

(Testimony of Eugene L. Grindle.)

Q. All right. Now that one sells for \$5. What about the Boeing stick that you spoke about yesterday at \$15.50?

A. Actually, I can't recall the actual design of that stick, but either that one or the one that Roylin had designed for the Boeing is an integral part of the fuel tank cap, and because you had to have a separate dipstick for each tank, with four dipsticks the separate parts would cost \$15.50, and it would have been additional weight, which is also a [180] factor that would involve revenue to Pan American.

Q. And the price of that was \$15.50?

A. At the time. That, you understand, was back in 1948.

Q. Do you regard the Boeing stick at \$15.50, or whatever its current price is, as comparable in efficiency to the dipsticks in this action before the Court?

A. Comparable in efficiency?

Q. Yes. A. I would say yes.

Q. Are they not——

A. As a matter of fact, Mr. Naylor, Mr. Welch has to this day never produced a dipstick within the tolerances specified on our drawings.

Q. Well, you misunderstood me. I was talking about the dipsticks here before the Court as exemplified by all of the exhibits here; not just Mr. Welch's stick, your prototypes, too.

A. All right.

Q. Now what would you say?

(Testimony of Eugene L. Grindle.)

A. I would say that they are all about the same efficiency.

Q. No advantages?

A. The advantages of the liquid—there are advantages to the liquid column dipstick, but it is perhaps equally offset by its disadvantages; so all in all they are all on about the same level. [181]

Q. I understood you to say yesterday that in drafting the release letter of June 10th, 1948—that is Plaintiff's Exhibit 10—you intended merely to give Pan American's permission and did not intend to deal with your personal rights as to the dipstick; is that correct?

A. That is correct. There was no mention whatsoever of any patent rights in that letter.

Q. And conversely, there was no reservation in that communication of any asserted patent rights, were there?

A. No, there was not. I could never have possibly conceived, Mr. Naylor, that any vendor would be so brazen as to claim invention of an item that he was manufacturing to someone else's drawing.

Q. We will come to that in due course; but as of June 10th, 1948, did you believe that you had any personal rights in the dipstick of your asserted design?

A. I always did, and I have never believed otherwise.

Q. Well, if that is true, why did you consider it necessary to later seek a release from Pan American?

(Testimony of Eugene L. Grindle.)

A. Because by this time Mr. Welch had a patent number on the dipstick and if I were going to produce dipsticks, it would be a difficult thing for me to sell in competition with one that Mr. Welch had with a patent number on it.

So as a legal expedient, I obtained a release from Pan American primarily for the purpose of this legal action. [182]

Mr. Naylor: Do you have the original of this?

Mr. Hohbach: Your Honor, we have the original.

Mr. Naylor: Thank you.

Q. I will show you a document which Mr. Hohbach has handed me which purports to be dated October 6, 1954, and I will ask if that is the release of which you spoke? A. Yes; it is.

Mr. Naylor: I have an extra copy, Your Honor, if you wish to follow it.

Q. I would like to ask a few questions concerning this release.

I note it is directed "To Whom It May Concern" rather than to you personally.

A. That is correct.

Q. Why was that?

A. The point that we knew would be in question here was whether I as an employee would have rights to any invention of mine, or whether my employer would have those rights; and to establish that point I considered that it would be advisable to have a statement of Pan American's policy regarding inventions to show that they waived their rights in this thing to the possible inventor.

(Testimony of Eugene L. Grindle.)

Q. And that is the reason for the choice of "To Whom It May Concern"?

A. Well, I would consider that it was. I asked for [183] primarily a release of this dipstick and a statement of their policy. You belabored the question of Pan American's policy to some extent, Mr. Naylor, and we had foreseen such an event.

Q. Now, directing your attention to the first paragraph of this document—which, incidentally, may we have marked as Defendant's Exhibit first in order for identification, if Your Honor please?

The Court: So ordered.

The Clerk: Defendant's Exhibit A for identification.

(Release marked Defendant's Exhibit A for identification.)

Q. (By Mr. Naylor): Directing your attention, Mr. Grindle, to the first paragraph of Defendant's Exhibit A for identification, I notice that Pan American speaks of its shop rights, if any.

A. Uh-huh (affirmative).

Q. Do you know the reason for that choice of language?

A. Yes; Pan American on all releases of inventions to their employees retains shop rights; they are entitled to shop rights to make it in their own shop, or to purchase it royalty free if their employee is collecting royalties on an invention.

You understand that an employer would only have shop rights to an item that was invented by one of their employees. [184]

(Testimony of Eugene L. Grindle.)

Q. In that same paragraph I note that there is no specific identification of any particular dipstick. Can you explain the reason for that?

A. Well, Mr. Naylor, I didn't dictate this at all; it was written by our legal counsel.

Q. Mr. Fox?

A. It was actually written by his assistant legal officer Mr. Loche.

Q. Mr. Loche?

A. Mr. Bill Loche—William Loche, L-o-c-h-e. I told him, or asked him for a release. This is what he gave me. If you would like this to be reworded specifically, I don't think we would have much trouble getting it.

Q. I am not concerned; I am merely concerned with what the words mean. Did you supply Mr. Loche with the identification that he employs in the general words: "A hollow calibrated stick commonly called a dipstick"?

A. Mr. Loche in a very—without taking too much time, reviewed this file. He saw the dipstick that was involved, and the choice of words here describing it were his.

Q. They are his words. All right; coming to the second paragraph. You are not specifically mentioned in that paragraph in any way, are you?

A. No; not personally.

Q. You are not identified in that particular paragraph either [185] as the beneficiary of this so-

(Testimony of Eugene L. Grindle.)

called release or as an inventor or otherwise; isn't that true?

A. That is correct, Mr. Naylor. It was not to the interests of Pan American to make a long legal investigation into this matter and put in writing that I was the inventor.

That would take some investigation, and that is why we are in this court.

Q. Will you say that again? I didn't quite understand you or follow you.

A. I am saying that Pan American did not go to the legal expense or take the time of their legal officers to investigate this program to assure that I was the inventor. I'm saying that that is why we are in court here, to try to prove that I am the inventor.

Q. Well, are you prosecuting this action on behalf of Pan American Airways?

A. I am prosecuting this action on behalf of myself and I have this to show that I—that Pan American has no part in the patent action; they have released their rights in any patent to the dipstick.

Q. Now you call this a release. It is actually a renunciation of any rights that Pan Am has to whom it may concern, or to the world, isn't it?

A. It is specifically a release. It uses the words "hereby releases." [186]

Q. To whom?

A. To whom it may concern.

Q. And that is Mr. Welch?

(Testimony of Eugene L. Grindle.)

A. Mr. Fox is not a federal judge sitting in judgment as to who invented the dipstick, and he knew that there was going to be litigation as to who was. I said I was. Mr. Welch came in and said that he was.

Mr. Fox is not going to take Pan American's valuable time to determine a minor item like this.

The Court: If I may make an observation, Mr. Naylor: I think we are getting a little bit far afield in the interpretation of this instrument, a copy of which I have in my hand and which has been introduced as your exhibit for identification.

The interpretation of that instrument is primarily the responsibility of this Court and I don't think should be the subject of any difference of opinion between you and the witness.

Mr. Naylor: I was pursuing it—I think I should state, your Honor, I am through with that particular aspect of this matter; but it has been difficult for us to discern the line of demarcation between the rights of Pan Am, if any, and the plaintiff in this action, and it was through this estimate——

The Court: I have allowed you to pursue this line of [187] examination, but I think now you have just about exhausted it.

We will take morning recess.

(Recess.)

Q. (By Mr. Naylor): Just one final question concerning Defendant's Exhibit A. Mr. Grindle, I assume you have read the declaration of policy that is contained in that document, have you not?

(Testimony of Eugene L. Grindle.)

A. Yes; I have.

Q. And is that your understanding of the company policy? A. Yes; it is.

Q. And is that substantially the understanding you had as early as June 10th, 1948?

A. Oh, that is the understanding I had long before I came to Pan American Airways.

Q. I see.

A. Because I have known engineers of Pan American prior to my employment there that have invented things that are patented and they are collecting royalties on them personally. They invented them on Pan American's time, and at their direction.

Q. And despite that knowledge, you never filed an application on what you believed to be your invention in a dipstick? A. That is correct.

Q. Now did you ever assert to Mr. Welch, by writing or in [188] conversation, prior to the 'phone call of which you spoke yesterday, which I think was in 1953, that you claimed personal inventor's rights in the dipstick? A. Yes, I did.

Q. When?

A. Specifically in writing on June 10th, 1948, in which I transmitted with that letter three copies of our drawing showing me as the designer.

Q. I am glad you mentioned that. That is Plaintiff's Exhibit—— A. 8.

Q. 8. I assume you are referring to the box in the lower right-hand corner of that drawing.

A. The Pan American title block.

Q. I beg your pardon?

(Testimony of Eugene L. Grindle.)

A. The Pan American title block.

Q. Title block. And you have reference to the fact that after the word "designed" it states in printing "E. Grindle"; right?

A. That is correct.

Q. And immediately below that is "Drawn R. Chong, 6/4/48"; correct?

A. That is correct.

Q. And who printed in your name after the word "Designed"? A. Mr. Chong. [189]

Q. And at whose direction?

A. I doubt if it had to be specifically directed; Mr. Chong was quite aware that I had designed it, but I perhaps directed him to put it in there. I recognize it as his lettering.

Q. Yes. Now that, you say, was an assertion that you were the inventor of the structure illustrated in that drawing? A. That is correct.

Q. Now other than the furnishing of this drawing—that's a parts drawing; isn't that what it is known as?

A. That is a design drawing, Mr. Naylor.

Q. A design drawing?

A. That is correct.

Q. Now, other than this design drawing, Plaintiff's Exhibit 8, did you ever, in writing or in conversation, prior to your phone call in 1953, assert to Mr. Welch that you claimed to be the inventor of this subject matter?

A. Not after that letter, no. The question never entered my mind.

(Testimony of Eugene L. Grindle.)

Q. By "letter," you mean the June 10th, 1948, letter? A. The June 10th letter.

Q. Now I would like to direct your attention to the letter of June 10th, 1948, which is Plaintiff's Exhibit 12. That of course does not contain any assertion by Pan American or by you that you were the inventor of the subject matter; is that [190] correct.

A. In essence I believe it does in that it talks about the release of a design, which was the purpose of giving this letter to Mr. Welch. Why would it be necessary to write such a thing if the question of Pan American design or Pan American employee design were not present?

Q. That is your present interpretation?

A. That has always been my interpretation, Mr. Naylor.

Q. Well, I ask you if there are any words in there—and if there are I would like you to point them out—which say—

A. I would like to again say in relation to this letter, that this was to be a sales leader for Mr. Welch to use this to interest other employers or other airline operators in purchasing these dipsticks from him and also showing them that he had permission from the designer to sell them.

Q. You say a "sales leader." Do you have any knowledge that it was ever so used?

A. I can't say that I have, but I do have definite knowledge that that is what he told me he wanted

(Testimony of Eugene L. Grindle.)

the letter for. It more or less gave me the letter, of how to form the letter for him.

Q. And it is your testimony that this letter was framed especially at Mr. Welch's request?

A. Absolutely.

Q. That's your testimony? [191]

A. Absolutely.

Q. Now I gather from what you have said, Mr. Grindle, that it did not concern you in the least that Mr. Welch was going ahead with the development of business in the dipsticks until the incident with Mr. F. Burfiend in October, 1953, when it was brought to your attention that there was a patent number on the article?

A. That's correct.

Q. Why did it not concern you prior to that time?

A. Because to that day I thought Mr. Welch was still selling dipsticks for \$5 each to Pan-American World Airways.

Q. Did it concern you whether or not he had built a business in manufacturing and selling dipsticks to the airline operators and others other than Pan-American?

A. Up to that time I was more or less happy to see that Mr. Welch had an income and a good income from this dipstick. I didn't resent that.

Q. You had no resentment?

A. My resentment was when I found that he had claimed invention to the thing and had foregone our agreement.

(Testimony of Eugene L. Grindle.)

Q. So that you were perfectly happy, were you not, and content from June 10th, 1948, until the discovery of the patent notice on the article to see Mr. Welch build a business in this particular article?

A. Why, I would say that I was. I know that at some time [192] prior to that, as early as some time in 1950, when I started developing things for manufacturing myself that I began to entertain ideas of manufacturing the dipstick along with these other things, but I didn't make any particular effort at the time because I thought Mr. Welch was still charging \$5, and I didn't go to the trouble of investigating then to see if he had raised the price, because I never suspected that he had.

Q. Suppose he had been charging \$5, would you have entered or embarked upon the business of manufacturing dipsticks? A. I might have.

Q. I don't quite follow you.

A. It is hard to say what I would have done had the situation been different.

Q. I don't quite follow you then on the significance of the price differential. Was that the sole consideration that motivated your entering or entertaining ideas——

A. I told you that there was a dual consideration. One was that he had claimed invention of an item that I had invented or designed, and two, that he had not lived up to his agreement that I negotiated with him for Pan-American. It appeared to me that he now felt that he had the thing ex-

(Testimony of Eugene L. Grindle.)

clusive and that he was going to tap the market for all he could get.

Q. That's your interpretation? [193]

A. That's my interpretation.

Q. Now I would like to touch on this matter of the company with which you were associated. What was the name of that again, Mr. Grindle?

A. The name of that is the Deterget Corporation.

Q. And is that a California corporation?

A. Yes, it is.

Q. And where does it have its principal place of business?

A. The principal offices are in my home.

Q. And your home is where, sir?

A. 1062 South Claremont Street, San Mateo.

Q. And has it always been located there?

A. No, it has not. I formed that corporation when I was in an apartment in Burlingame, California.

Q. And was your apartment its original place of business? A. Yes, it was.

Q. And then it changed to the current address?

A. That is correct.

Q. Yesterday you spoke of facilities that it possessed. A. That is correct.

Q. Where are those facilities located?

A. They are in the garage and home of an associate of mine, Mr. Savage, in Redwood City. He has very adequate shop facilities.

(Testimony of Eugene L. Grindle.)

Q. And I assume that in Mr. Savage's workshop he has [194] tools of his own; is that correct?

A. Very—quite a few tools, yes.

Q. Quite a few tools?

A. Yes; power tools, machine tools, many hand tools, and special tools of all kinds.

Q. Does Deterget have any of its facilities commingled with the tools of Mr. Savage?

A. Yes, it does.

Q. When did it establish the shop in conjunction with Mr. Savage's garage?

A. Well, the first products that we manufactured and sold were made in those facilities, and I believe it is about three years now.

Q. Three years ago. Could you fix an approximate time for that, Mr. Grindle?

A. I could fix the exact time that I sold them if I went back through my records. My first order was for 20 units to Pan-American Airways. It was in February, either of '53 or '54. I recall the time of the year, but—

Q. That is close enough. Now who are the other stockholders in Deterget?

A. Is it—I don't know that it is proper for me to answer that. If I am directed so, I will.

Q. Well, I would like to know. I suggest that it is—

A. I would like to ask advice of my counsel in that respect. [195]

Mr. Hohbach: You may answer, Mr. Grindle.

A. All right. I have a Mr. Maurice C. Hanafin.

(Testimony of Eugene L. Grindle.)

Q. Maurice C. Hanafin?

A. Yes. The name is spelled M-a-u-r-i-c-e C. Hanafin—and Dr. E. G. Pickles, Mr. Savage and myself are the stockholders in the corporation.

Q. Does Mr. Hanafin take an active part in the operation of Deterget Company?

A. Yes, he does.

Q. In what way?

A. He is an officer and director and a very valuable counsel in all the business aspects of it.

Q. What about Dr. Pickels?

A. Dr. Pickels the same—very active. We have a routine monthly meeting and frequent meetings in between these formal meetings. Dr. Pickels is a well-known—world-wide known physicist and a very valuable technical counsel to me, and it was Dr. Pickels and myself who are co-inventors of the vacuum cleaner.

Q. And Mr. Savage, what activity does he do?

A. Mr. Savage does all the production work for the corporation.

Q. Production work?

A. He is also a valuable technical counsel, helped with the development of the vibrometer. He and I are co-inventors [196] of the vibrometer.

Q. Now is this action being prosecuted by you or Deterget?

A. This action is being prosecuted by me.

Q. And I assume that you are receiving some backing and financial support in the prosecution of this action?

A. None whatsoever.

(Testimony of Eugene L. Grindle.)

Q. From your backers?

A. None whatsoever.

Q. How then do you reconcile that statement with your testimony of yesterday in which you stated in effect that your stockholders have authorized you to go only so far?

A. No difficulty reconciling that at all, Mr. Naylor.

Q. What do you mean by that?

A. My stockholders have authorized me to spend certain corporation funds in the manufacture and production of dipsticks, and that is all.

Q. Is it your statement then that they are not supporting this action in whole or in part?

A. They are not supporting—the corporation is not providing the funds for this action. I at my sole expense am undertaking this legal action.

Q. Who was the finance group that you mentioned on your direct examination yesterday?

A. Mr. Hanafin and Dr. Pickels primarily; they have other associates down there that have financed me on another item. [197]

Q. And it is your statement that you are not receiving any assistance from that particular finance group?

A. That is correct. My attorneys can testify to that; I am in their indebtedness to some extent.

Q. Now the lawsuit was filed March 27, 1955, was it not?

A. If that is the date shown on it.

(Testimony of Eugene L. Grindle.)

Mr. Naylor: Will you stipulate that that is the filing date?

Mr. Hohbach: Surely.

Mr. Naylor: March 27, 1955.

The Witness: All right.

Q. (By Mr. Naylor): Now as of the date of filing of this complaint, what if anything had you personally done to embark upon the business of producing and selling dipsticks?

A. I had spent considerable time and certain moneys in completely investigating and evaluating the costs of production, the availability of materials, the tools that I would require, the manpower that I would need to do the work, and so forth—very complete studies, so that I had reached the point where my next step would have been to start purchasing materials.

Q. That would have been the next step?

A. That is correct.

Q. And I take it from that statement that as of March 27, 1955, there had been no purchase; is that correct? [198]

A. As of March 27, '55, I believe that is correct.

Q. And I assume by that that you mean there were no purchases of special jigs, dies, tools or fixtures, is that correct?

A. I have never purchased jigs, tools, dies, or fixtures, Mr. Naylor; my production people make them themselves. They are very, very well qualified to make all my tooling—expert machinists.

(Testimony of Eugene L. Grindle.)

Q. All right. You had purchased no materials; that we are in agreement on, isn't that a fact?

A. There might have been some small materials that I purchased, raw stock for making tools and so forth, but there had been very small expense, naturally.

Q. Any purchases that had been made designed especially for dipsticks had been of no consequence?

A. I was very careful not to make any expenditures toward the production of the dipsticks when I had been threatened with a lawsuit by Mr. Welch if I proceeded.

Q. I am glad you raised that point. Let's come to that conference. As I understand it, Mr. Flehr, Mr. Swain, Mr. Hohbach and you appeared in your behalf.

A. Mr. Flehr and Mr. Hohbach.

Q. Not Mr. Swain? A. Not Mr. Swain.

Q. I will stand corrected. And on Mr. Welch's side, Mr. [199] and J. Bruce Fratis; is that correct?

A. That is correct.

Q. How did that conference open? What was the purpose of calling that conference?

A. The purpose of calling that conference was again to demand the assignment of the patent to me. Not understanding too much about legal matters, I understood that that was the proper approach to this particular program.

Q. This came after there had been an exchange of correspondence between Counsel; is that a fact?

A. Yes.

(Testimony of Eugene L. Grindle.)

Q. And was it your understanding that such an exchange of correspondence had been terminated with a flat rejection on behalf of Mr. Welch of any claim asserted by you?

A. I believe they used words to that effect in Mr. Fratis' letter, yes.

Mr. Naylor: That is the whole file of correspondence. I would like to offer it so that the record is illuminated. Mr. Hohbach is going to be good enough to check his file to see that our file is complete on that.

Q. I assume that there was some preliminary discussion of your demand for an assignment; is that correct?

A. Yes.

Q. And then as I understood it yesterday, Mr. Flehr asked Mr. Welch if he would take action or sue for infringement [200] if you, Mr. Grindle, made the dipstick; is that correct?

A. That is correct.

Q. And what was the answer?

A. Mr. Welch stood up with a great flair and pointed to a drawing, Plaintiff's Exhibit 6, and said that I could make that dipstick; but then he pointed to the other drawing, Plaintiff's Exhibit 8, which embodies the design of the dipstick in question here, and said that if I produced that one he would sue me—he would bring suit against me.

Q. Did he use the word "sue"?

A. I believe he used the words that he would enforce his patent against me.

Q. Are you sure he used those exact words?

(Testimony of Eugene L. Grindle.)

A. He used the words "enforce his patent."

Q. Did he use those words or did Mr. Flehr use those words?

A. Mr. Welch used those words, very vehemently and with great flair and standing up and waving his arms at these drawings.

Q. Did you understand or did you hear Mr. Welch say that he would enter into no agreement with you whereby you would be permitted to make the subject matter dipstick of Plaintiff's Exhibit 8?

A. No; the only discussion on whether he would enter into an agreement with me was whether or not he would agree to assign the patent over to me. I was not interested in [201] negotiating any other agreement with Mr. Welch.

Q. And that was about the sum and substance of that particular conference?

A. Yes, it was. Mr. Fratis on one or two or possibly three occasions jumped up there and says, "If that's the way it is going to be, we'll get out of here." And they settled down again and talked some more.

Mr. Naylor: If Your Honor please, I think it might be well to have this exchange of correspondence in the record which both sides agree is the exchange between counsel.

The Court: Very well.

Mr. Naylor: And since I do not personally have photostatic copies of it, I wonder if it would be permissible for us to mark this as Defendant's

(Testimony of Eugene L. Grindle.)

next in order for identification so that we may have photostatic copies prepared?

The Court: That will be satisfactory.

Mr. Naylor: Thank you, Your Honor.

The Clerk: Defendant's Exhibit B for identification.

(File of correspondence marked Defendant's Exhibit B for identification.)

Mr. Naylor: It will be understood then that we may withdraw that for photostating purposes, Your Honor?

The Court: That is right.

Q. (By Mr. Naylor): Now Mr. Welch has never had any dealings with Deterget Company, has he? [202] A. None whatsoever.

Q. And Mr. Welch has never threatened Deterget Company in any manner, has he?

A. No, he hasn't.

Q. There have been no relations whatsoever?

A. None. Deterget Corporation is not a party to this action.

Q. Will you be good enough to examine the soft copy of the Welch patent, Plaintiff's Exhibit 2, and the print of the April 28, 1948, drawing, Plaintiff's Exhibit 6, with particular reference to Claim 1 of that patent. A. All right.

Q. You have already testified that you have a familiarity with Claim 1? A. Yes, I have.

Q. Now will you consider the language of Claim 1 of the Welch patent and state whether or not it

(Testimony of Eugene L. Grindle.)

has any applicability to the dipstick that you illustrated in your April 28, 1948, drawing, Plaintiff's Exhibit 6?

A. Is there any similarity between the two?

Q. I didn't ask that. Does Plaintiff's Exhibit 6 satisfy the definition of the device in Claim 1? If you have any difficulty with it, just say so, and I will ask specific questions.

A. Claim 1, as well as Claims 2 and 3, covers the sealing—the method of sealing the end in the tubes. My drawing, [203] Plaintiff's Exhibit 6, calls for an extrusion. No; nothing on there about how to assemble a dipstick or how to seal the ends.

Q. There is a greater difference than that, isn't there, Mr. Grindle?

A. It is about as great a difference as there could be when one doesn't even call for an end to be sealed and the other one is devoted to how to seal the end.

Q. I mean other than the sealing?

A. Other than the sealing, it describes the tubing as being a tubular body of transparent material, a reinforcing bar within the set body, and having grooves therein and graduated scales thereon on opposite sides of said grooves.

Q. All right. Now let's go back to it specifically. In Plaintiff's Exhibit 6—I take it that you are in agreement that that is a liquid measuring gauge comprising a tubular body of transparent material; is that correct?

(Testimony of Eugene L. Grindle.)

A. I do. I contend that it is a drawing of an extrusion intended for that purpose.

Q. I will abide by that; I will go along with that. Now are we in agreement that you contemplated for use in Plaintiff's Exhibit 6 a reinforcing bar within said body? Will you go with me on that?

A. Absolutely.

Q. Now I would like to ask you if that reinforcing bar was [204] to have grooves therein?

A. Obviously not.

Q. Now there we are in disagreement, aren't we? In other words, it doesn't have grooves?

A. It does not have grooves.

Q. Was it intended to have graduated scales on the reinforcing bar on opposite sides?

A. On all four sides.

Q. Yes. Did Plaintiff's Exhibit 6 contemplate transparent measuring tubes within said grooves with their opposite ends extending beyond the length of the body?

A. You have already established that there were no grooves, so it wouldn't be related.

Q. And you have already said that Plaintiff's Exhibit 6 did not purport to illustrate end sealing means; is that correct?

A. That is correct. We have already established that at this time we were only asking for extrusions from an extrusion manufacturer.

Q. Now will you please examine Plaintiff's Exhibit 5, Mr. Grindle, and again in the language of Claim 1 of the Welch patent, I would like to ask

(Testimony of Eugene L. Grindle.)

you if that particular replica—it is a replica, is it not? A. It is a replica.

Q. And it was made fairly recently, was it not?

A. Yes, it was. [205]

Q. I would like to ask you if that is a liquid measuring gauge comprising a tubular body of transparent material? A. Yes, it is.

Q. Is it laminated? A. Correct.

Q. And does it have a reinforcing bar within said body? A. Yes, it does.

Q. Now in that particular exhibit, Plaintiff's Exhibit 5, does the reinforcing bar have grooves therein? A. No, it does not.

Q. It does not. Does it have graduated scales thereon on opposite sides? A. Yes, it does.

Q. And does Plaintiff's Exhibit 5 have transparent measuring tubes within said grooves?

A. Yes.

Q. It does? A. Yes, it does.

Q. Would you please explain that?

A. Well, Your Honor, the transparent measuring tubes within the said body are these grooves on all four sides running the entire length of the assembly.

Q. Actually, though, in Plaintiff's Exhibit 5, what you now term to be transparent measuring tubes are wholly contained within the outer shell of the structure; is that [206] not correct?

A. That is correct.

Q. So you would not have believed that the trans-

(Testimony of Eugene L. Grindle.)

parent tubes were situated in grooves in the reinforcing bar?

A. No, I would not. I think the exhibit speaks for itself as to where the grooves are located.

Q. Did you say tubes or grooves—where the tubes are located?

A. Tubes or grooves, you can call them either one. They are one and the same thing.

Q. Now does Plaintiff's Exhibit 5 have transparent measuring tubes with their opposite ends extending beyond the length of said body?

A. No, it does not.

Q. It does not. Does Plaintiff's Exhibit 5 have plugs in the opposite ends and hermetically sealing the ends of said body against the entrance of liquid within said bodies surrounding said measuring tubes?

A. Yes, it does.

Q. And what is the order of thickness of the end plugs in Plaintiff's Exhibit 5?

A. They are relatively thin; they are approximately a sixteenth of an inch thick.

Q. A sixteenth of an inch?

A. Correct. [207]

Q. And with what were they cemented into the structure, Mr. Grindle?

A. With what cement?

Q. Yes. A. With acetone.

Q. Acetone? A. Acetone.

Q. And I assume that you had acetone available at Pan Am when this particular replica was made?

A. By the barrellfuls, Mr. Naylor.

Q. Is it your testimony, Mr. Grindle, that this

(Testimony of Eugene L. Grindle.)

is an exact replica of the device that was caused to be sent to Plastics Process Company of Los Angeles?

A. Physically, structurally, the shape, the size and everything is an exact replica. There is only one minor difference.

Q. What is that?

A. That is in the materials. When I had this made up we didn't have any sixteenth inch flexiglass available in stock of the length required here, so it was made of polyvinolchloride, which we did have in stock. So the only difference is the actual plastic material here. We used flexiglass or lucite on the first one because it is a much clearer plastic.

Q. But except for that there was no difference between the [208] replica and the original device?

A. Well, the actual graduation in this thing, I drew this by hand; in the original one it was drawn with a Leroy lettering set.

Q. Now were there any other differences?

A. None whatsoever. Those are the only differences.

Q. I take it then that it is your testimony that the original sample in May of 1948 had its ends sealed with plugs; is that correct?

A. Oh, absolutely, the stick—it would not have been a dipstick unless the ends were sealed.

Q. Was any test conducted with the original sample?

A. None whatsoever, Mr. Naylor. I explained yesterday that there would have been no purpose

(Testimony of Eugene L. Grindle.)

in conducting destruction tests of the original sample because it was a preliminary design intended to be made into an extrusion; that some time as we had assembled a dipstick of a production extrusion material, it would have been tested to destruction. This particular sample or the sample at that time was submitted to a functional test to see if the fluid level would be readable and so forth, and it passed that very adequately.

Q. And that was the only test?

A. That was the only test, yes.

Q. Now this morning and yesterday afternoon on the direct examination of Mr. Hohbach, you gave your testimony as to [209] what you believed was or was not invention, did you not?

A. Yes, in relation to the claims in the patent.

Q. What is your definition of invention, Mr. Grindle?

A. My definition of invention is the development or design of something completely new that has never been used before, or the combination—a new combination of ideas that have been developed before. And personally I do not recall any what I would consider basic inventions for many, many years unless they have been in the atomic research field or something like that.

Q. From whence did you gain this understanding of invention that you have just recited?

A. Oh, in my design relationships and patent relationships over the past twenty years.

Q. Did you have any conversation about that

(Testimony of Eugene L. Grindle.)

definition with Mr. Hohbach before the commencement of this trial?

A. Why, I have had conversations with Mr. Hohbach and have consulted them on different things many times ever since my association with them, which has been over five years.

Q. I assume that you have, sir; but my question was, before the commencement of this trial, did you have specific conversations with Mr. Hohbach concerning what is an adequate definition of invention? A. I can't say that I did, no.

Q. So that your criterion of invention is based solely upon [210] an accumulated sum total of knowledge gained by you over a period of years in your contact with patent matters; is that correct?

A. Not just my contact with patent matters, but I have been associated with design engineers for the past twenty years and patents have been discussed quite often, and designs have been discussed for the application of patents and so on. It is a rather common topic of conversation among design engineers.

Q. I assume it would be. Do you subscribe personally for the United States Patent Office Gazette? A. No, I do not.

Q. Have you ever had occasion to examine the United States Patent Office Gazette?

A. Yes, I have.

Q. On a week-to-week basis?

(Testimony of Eugene L. Grindle.)

A. No, I have never done it as a routine matter.

Q. So you don't profess to be abreast of the technological advances and inventions that are made in the many fields for which patents are granted, do you? A. No, not at all.

Mr. Naylor: Your Honor, that just about completes my cross-examination. I wonder if we might halt at this point, and I would like to double check my notes and boil it right down to the very essence. [211]

The Court: Very well. Do you want to come back at 1:30 or 2:00?

Mr. Naylor: May I ask your indulgence today to come back at two? I have a matter with one of the U.S. Attorneys and I am supposed to go down and see if there are some papers at the office. That will be the only opportunity I will have.

The Court: We will adjourn then until 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock p.m., same day.) [212]

Thursday Afternoon Session, February 9, 1956, 2:00

EUGENE GRINDLE

resumed the stand; previously sworn.

Cross-Examination

(Continued)

By Mr. Naylor:

Q. Mr. Grindle, do you recall making an affidavit in this case on May 25, 1955? A. Affidavit?

Q. Yes.

A. I would have to see it to remind me of that. Are you referring to the deposition?

Q. No, an affidavit. I will show you, Mr. Grindle, Plaintiff's affidavit in opposition to Defendant's motion to dismiss, this being the service copy that we received as counsel for Mr. Welch, and will ask you if you recall making that affidavit.

A. Yes, I am.

Q. Will you examine paragraph 7 thereof?

A. All right.

Q. You have examined it?

A. I have examined it.

Q. It contains the statement, does it not, that the dipstick shown in patent 2,534,644, and then it has reference to a printed copy of the patent—is substantially identical to that in drawing D-32.016.-114, which is Plaintiff's Exhibit 8 [213] in this case; is that not a fact? A. That is a fact.

Q. And then it goes on to say, "and that he"—meaning you—"has been informed that Claim 1 of the patent covers the dipstick shown in drawing

(Testimony of Eugene L. Grindle.)

D-32.016.114." A. That is correct.

Q. That is correct, is it not? Now, what about Claims 2 and 3?

A. Claims 2 and 3 differ from Claim 1——

Q. And I take it you were therefore not informed or advised that Claims 2 or 3 cover the subject matter of Plaintiff's Exhibit 8 in this case.

A. As we have gone through, Claims 2 and 3 differ from Claim 1 only to the extent that they call for the end plugs, rather than just being plain plugs——

Q. I am aware of that.

A. ——to be laminated.

Q. I am aware of your differentiation between the claims, but I ask again: I take it that you were not informed by your counsel that Claims 2 or 3 covered the subject matter of Plaintiff's Exhibit 8.

A. Well, I believe I was to the extent that they embody in essence the same thing as Claim 1 did.

Q. Well, do you have a positive recollection of that?

A. Well, it has always been my understanding since we first [214] reviewed this patent that the three claims were evolving the same detail in the dipsticks, and there wasn't much question whether I was advised specifically in writing or verbally by my counsel; I couldn't recall.

Q. How, then, do you account for the fact that Paragraph 7 of this May 25th, 1955, affidavit makes specific reference to Claim 1 only?

A. Only because it is referring to—it makes

(Testimony of Eugene L. Grindle.)

specific mention of this drawing, Plaintiff's Exhibit 8, and there has never been any claim on my part that that drawing called for laminated plugs in the end. This Paragraph 7 relates specifically to this drawing, Plaintiff's Exhibit 8.

Q. And you do not contend now, do you, that drawing 114, which is Plaintiff's Exhibit 8, called for a laminated plug structure?

A. I call now for the fact that the drawing now as well as that time called for a plug in the end. How that plug was put in there, whether it was laminated in or put in with cement or put in as a solid block, ends up as a solid block no matter how it was put in there.

Q. That's your present interpretation?

A. That is correct. Did Your Honor see that affidavit?

The Court: It hasn't been offered in evidence yet.

The Witness: Oh. Excuse me.

Q. (By Mr. Naylor): Now, coming back to that very same [215] question again, has your counsel ever advised you that claims 2 and 3 covered the subject matter of Plaintiff's Exhibit 8?

A. The matter has been discussed quite thoroughly between my counsel and myself regarding the physical difference between a laminated structure and a solid plug, and in essence I came away from those discussions with the clear understanding that Claims 2 and 3 also covered essentially the

(Testimony of Eugene L. Grindle.)

same thing as Claim 1 and were more or less covered by the drawing calling for the end plug.

Q. Now, you have explained your answer. I would like to have the answer. Has your counsel ever specifically advised you that Claims 2 and 3 of the Welch patent covered Plaintiff's Exhibit 8?

A. I cannot answer that specifically unless my counsel can produce some written document to that effect, which I might recall if I read it.

Q. Do you know of the existence of any such document? A. No, I don't.

Q. And it is true, is it not, Mr. Grindle, that as of May 25, 1955, they had not so advised you, isn't it?

A. I did not say that they hadn't advised. Mr. Naylor.

Q. Well, I say, it is true as of May 25, 1955, they had not so advised you?

A. I did not say that at any time they did not advise me. I don't recall whether they did specifically or not. [216]

Mr. Naylor: I will offer that affidavit, Your Honor, as defendant's next in order, if I may. I will have to produce a copy of it.

The Court: It will be received in evidence.

The Clerk: Defendant's Exhibit C in evidence.

(Whereupon affidavit referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Naylor: Mr. Swain has been kind enough

(Testimony of Eugene L. Grindle.)

to supply me with a conformed copy of that affidavit. I assume that will be satisfactory to the Court.

The Court: Yes.

Mr. Naylor: It will be satisfactory to us.

Q. Now, yesterday Mr. Grindle, under direct examination you testified concerning the occasion of Mr. Welch's second visit to you at Pan American.

A. Yes.

Q. This was the visit following the initial visit in which you gave him a copy of Plaintiff's Exhibit 4; isn't that correct?

A. What is Plaintiff's Exhibit 4?

Q. That is the April 28th, 1948, drawing—I mean 6; I beg your pardon. 6. A. Exhibit 6?

Q. Exhibit 6.

A. That is the drawing—that is the extrusion drawing? [217]

Q. That's right, sir.

A. And you said I gave that to him on the first or second visit?

Q. On the first visit.

A. On the first visit; that is correct.

Q. What actually happened on the occasion of the second visit?

A. On the occasion of the second visit there was possibly some contact with Mr. Welch, I believe, by telephone prior to his first visit and the time that he returned with the material from Los Angeles. I might have called him and asked him if he had heard anything or something like that. But what I can remember is his—what I believe was his

(Testimony of Eugene L. Grindle.)

second visit, he had received material from Los Angeles and he brought that in to me in the form of a three foot length of square plastic extrusion and two three-foot lengths of quarter inch o.d. of round plastic extrusion.

Q. All of these pieces were three feet in length; is that correct?

A. Approximately three feet in length.

Q. Well, was there a difference?

A. I didn't measure, Mr. Naylor.

Q. Did you compare them as to length?

A. At least—the tubes as to length?

Q. Yes. [218]

A. I can't recall that I did. If you are getting at was the round tube an eighth of an inch longer, it possibly was.

Q. It possibly was. Now, can you fix the time of this second visit, Mr. Grindle?

A. The second visit?

Q. Yes, sir.

A. Yes, it was approximately the middle of May; take or add a day or two from the middle of May.

Q. Middle of May, 1948?

A. That is correct.

Q. Now, where were you when Mr. Welch came to you on that visit?

A. I was sitting in my chair behind my desk in Room 205 of the hangar building just to the left of the door. My office is on the west side of the hangar, in the middle of the hangar.

Q. Were you alone at the time?

(Testimony of Eugene L. Grindle.)

A. I was in a room that seated at that time seven engineers. My desk was a little way from the general group of desks. I was over on the east wall of the office building and the other desks were over on the west wall.

Q. Did the conversation that ensued with Mr. Welch take place at your desk?

A. At my desk.

Q. Did any persons other than Mr. Welch and yourself [219] participate in this conversation?

A. No one.

Q. The two of you.

A. Just the two of us.

Q. And approximately how long did this conversation last?

A. Fifteen minutes at the most.

Q. Now, will you give again the remarks made by Mr. Welch upon producing, as you say, the three pieces of tubing?

A. Yes. I naturally could not quote his exact words, but they were that he was advised by his company and in Los Angeles that the extrusion embodied in my drawing, Plaintiff's Exhibit 6, would be costly to manufacture or to produce; that they had this stock material, this particular material he brought with him in stock as a standard item, and asked if that could be used in the design of the dipstick.

Q. And what reply, if any, did you make to that?

A. I looked at the material. I could immediately vision the application of that material to a com-

(Testimony of Eugene L. Grindle.)

pleted dipstick product, and said that I believed it would do the job and be satisfactory.

Q. And what was the closing of that conversation? On what note did it close?

A. It closed on the note that I would make up a drawing and that we would manufacture a stick like that and test it and see if it would be acceptable. [220]

Q. Is that all there was to the second visit by Mr. Welch? A. Just about all.

Q. And did you retain the three pieces of tubing that he produced? A. Yes, I did.

Q. And what did you do next after that conversation with Mr. Welch?

A. I would like you to understand, Mr. Naylor, that this dipstick project at Pan American has taken on a great amount of importance in this court case, but it was a relatively minor phase of my work at Pan American. But as soon as I had the opportunity—and I can't recall whether it was immediately, that day, the next day, or how soon—I took this material in the drafting room to the drafting supervisor, Mr. Ray Chong, and discussed with him the making of a drawing of a complete dipstick using this material, and I left the plastic with him. I made the sketches at the time, discussing how I wanted it drawn, how I wanted the calibration placed on it and how I wanted the filler cut to accommodate the tubes and how I wanted the ends sealed.

(Testimony of Eugene L. Grindle.)

Q. And would you describe for us the characteristics of the wooden filler that you sketched in these sketches?

A. Yes; they were to be routed out round to fit the contour of this small round tube that was in opposite corners [221] of the assembly.

Q. And were there any other characteristics to be imparted to the wooden core other than those you have enumerated?

A. Yes; the drawing itself required very accurate, detailed layout in order that the wood size and shape would be such that the associated calibration paper could be submitted on there and would be positioned properly on the wooden filler. It was a very important part of the layout. Mr. Chong, possibly because of that layout requirement or consideration, made the drawing himself.

Q. Can you approximate for us when it was you delivered the material you have just been describing to Mr. Chong?

A. I would say that it was within a day or two of the time that Mr. Welch brought it in. I couldn't say exactly.

Q. And according to Plaintiff's Exhibit 8, Mr. Chong's work was completed on——

A. June 4th.

Q. June 4th, 1948; is that right?

A. That is correct.

Q. Now, I gathered from your testimony of yesterday that you had no problem in visualizing how the three pieces of tubing presented to you by

(Testimony of Eugene L. Grindle.)

Mr. Welch could be incorporated into a satisfactory dipstick; is that correct?

A. None whatsoever.

Q. And you say that the sketches and material that you [222] handed to Mr. Chong were presented to him within the space of a couple of days; is that correct?

A. That is correct.

Q. How do you account for the fact, then, that it took until June 4th to prepare the drawing?

A. As I tried to explain, Mr. Naylor, Pan American Airways is a large corporation and have considerable amount of work. I specifically recall that Mr. Chong and his group were heavily loaded at the time. We were engaged in a complete fire control modification of our aircraft with a deadline facing us. That work took priority; this was an incidental job. Mr. Chong did not get to this job for at least ten days after it was assigned to him, or after I took it in to him.

Q. And yet there was some degree of urgency in the procurement of these dipsticks by Pan American?

A. None whatsoever.

Q. Well, then, how do you account for the fact that there is a thirty day delivery date specified on the purchase order?

A. Only because Mr. Welch told us that he could deliver them at such and such a time, and we set up the procedures to accommodate a couple of weeks later. There was no urgency involved.

Q. No urgency? [223]

A. No; just a very routine matter. When we

(Testimony of Eugene L. Grindle.)

would get an approximate delivery date, we usually give a little cushion on that and then set up for it accordingly. We had been flying these airplanes by that time for five years or more with the old dipsticks.

Q. After Mr. Chong finished the drawing on June 4th, 1948, I assume that it came to you eventually for approval as indicated on Plaintiff's Exhibit 8?

A. That is correct.

Q. And that date was June 7th, '48?

A. That is correct.

Q. Now, can you tell us what occurred between June 4th, 1948, and the issuance of the Pan American purchase order on June 10, 1948?

A. I would—between June 4th?

Q. Yes.

A. And the issuance of the purchase order?

Q. Yes, sir.

A. About June 4th or 5th, an advance copy of that drawing along with a copy of a calibrated scale—full size scale drawn with Leroy, was given to Mr. Welch along with the plastic material that he had brought in to assemble a complete dipstick and return to us for testing.

Q. And do you recall approximately when it was returned to you for testing? [224]

A. On approximately June 7th or 8th—I am sorry; June 6th or 7th.

Q. June 6th or 7th?

A. That is correct.

(Testimony of Eugene L. Grindle.)

Q. And then you proceeded to make the tests as you detailed yesterday, is that correct?

A. That is correct. I didn't make them myself. I called in an assistant chief flight engineer, Mr. Hal Schmidt, to participate in the tests with me.

Mr. Naylor: That is all, Your Honor.

Mr. Hohbach: Your Honor, we have several questions we would like to ask Mr. Grindle on re-direct, but as you can see, we have three witnesses here that have come in from Pan American. They are still working for Pan American and they are coming in more or less on their own time, so we would like to get their testimony in this afternoon. So we are wondering if we could interrupt at this time——

The Court: That is satisfactory to me if it is to Mr. Naylor.

Mr. Naylor: That is entirely satisfactory, Your Honor.

The Court: You may step down.

Mr. Hohbach: Mr. Montoya.

HERBERT W. MONTOKA

called as a witness on behalf of the plaintiff;
sworn. [225]

The Clerk: Please state your name and occupation for the record.

A. Herbert W. Montoya.

Direct Examination

By Mr. Hohbach:

Q. What is your occupation?

A. Foreman in the wheel shop, Pan American Airways.

Q. You are employed by Pan American, is that correct? A. That is right.

Q. How long have you been employed by Pan American? A. Almost 15 years.

Q. Will you describe your position at the present time?

A. I am a master mechanic in the equipment shop.

Q. Do you know Mr. Grindle?

A. I do.

Q. How long have you known him?

A. Oh, since about '47, I believe, late.

Q. Have you worked with plastics?

A. Not up to that time I hadn't.

Q. That was your first contact with plastic work, is that correct? A. In that——

Q. What time are you speaking of?

A. Well, it was early in '48. I don't know the exact date.

(Testimony of Herbert W. Montoya.)

Q. Did Mr. Grindle ask you to make up a sample dipstick? [226] A. Yes, he did.

Q. Do you remember the construction of this dipstick? A. I do.

Q. Did he ask you to make up more than sample dipstick?

A. Well, we started making on one design and found out we couldn't make it hold the liquid so we changed it to the second.

Q. Can you sketch from memory the first design that you are speaking of that wouldn't hold liquid?

A. I believe I could.

Q. Do you want to make a sketch here showing roughly what the first design was? (Handing paper to witness.) What is the center part? Could you label it? A. The center is wood.

Q. Now what size was that?

A. I don't remember what size the wood was.

Q. What is that layer that you have shown on the outside of the wood? A. This is plastic.

Q. What kind of plastic was it, do you remember?

A. It was either plexiglass or lucite. I believe it was lucite that we were using. I am not a very good artist. This was all—the outside of that wood was all plastic.

Q. How was it made up with plastic?

A. Well, it was cut into long, narrow strips, and all [227] glued together.

Q. Where did you get the narrow strips?

(Testimony of Herbert W. Montoya.)

A. We cut them out of material that we got out of stock.

Q. How thick were these sheets?

A. I believe they were a sixteenth or a little better; I don't remember exactly the size.

Q. Did this incorporate a scale?

A. Yes, it did. The wood—Mr. Grindle brought down a wooden stick with a scale already glued on it. It was a piece of paper wrapped around the stick.

Q. Where were the fluid columns in the stick?

A. In the first one we made, the fluid columns were on the corners, and that's why we couldn't get the fluid to hold where we had glued it, so we later changed and in the next design we made the fluid columns in the center.

Q. How were the ends constructed on this sample?

A. Well, the wood was just a little bit shorter than the length of the plastic and there was a plug put in right over the top of the wood to seal off the wood and keep it from getting wet by the fuel.

Q. How thick was this plug?

A. It was the same material as we used for the sides; it was probably a sixteenth or a little better.

Q. Did you actually check this stick to see whether it was? [228]

A. We did.

Q. How did you do that?

A. By putting it into a can of water, holding your finger over the end of the stick and pulling it out to see if the fluid would hold.

(Testimony of Herbert W. Montoya.)

Q. You had trouble with leaking on this stick?

A. The first one we did, yes.

Q. Would Mr. Grindle come in and check to see what progress you were making with that stick?

A. Very frequently.

Q. When you found out that this one was leaking, what did Mr. Grindle suggest?

A. He suggested that we change the fluid column from the corners of the stick and put it in the center.

Q. Did you do that? A. We did.

Q. Did you make up another stick?

A. We made up several. We had a little trouble gluing this material, narrow strips, together and we did get one that would hold.

Mr. Hohbach: May I offer this in evidence as Plaintiff's next in order?

The Court: All right. Let it be received and marked. You better mark that Montoya so that we will know and differentiate between the one Mr. Grindle drew. [229]

The Clerk: Plaintiff's Exhibit 25 in evidence.

(Diagram drawn by Mr. Montoya was received in evidence and marked Plaintiff's Exhibit No. 25.)

Q. (By Mr. Hohbach): You went ahead and constructed the second dipstick, is that correct?

A. Well, the second one was the one he decided he wanted.

Q. Did you test that dipstick? A. We did.

(Testimony of Herbert W. Montoya.)

Q. Has Mr. Grindle recently had a dipstick made up in your department? A. Yes, he did.

Q. Who made up the dipstick?

A. One of my boys made it under my supervision.

Q. Is this the dipstick that was made up? It is Plaintiff's Exhibit 5. A. Yes, it is.

Q. As far as you can remember, does that resemble the dipstick that you made up for Mr. Grindle?

A. Yes, it is. It is pretty much the same except the material is different.

Q. How is it different?

A. Well, this is polyvinylchloride and the other was either a lucite or plexiglass.

Q. Are the fluid columns in this in the same position as the samples you made for Mr. Grindle? [230]

A. Yes, just about the same.

Q. Did the sample that Mr. Grindle accepted have end plates in it? A. It did.

Q. Does this one have end plates in it?

A. It does.

Q. Did the second sample you constructed for Mr. Grindle have a scale in it?

A. Yes, it did.

Q. And you actually checked that stick to see that it was operable; is that correct? A. Yes.

Q. Can you fix the approximate date when these samples were made?

(Testimony of Herbert W. Montoya.)

A. Well, it was early in '48, probably—as close as I could remember, it was early in the spring of '48; probably, oh, March or May; somewhere around in there. I don't know exactly the date.

Mr. Hohbach: That concludes my examination, if your Honor please.

Mr. Naylor: I have just one or two very short questions.

Cross-Examination

By Mr. Naylor:

Q. Mr. Montoya, I take it that you are not an expert in plastics; am I correct? [231]

A. No, I don't—I am not.

Q. You have not been educated in the chemistry of plastics have you? A. No, sir, I haven't.

Q. In your work in producing these models, I take it that you took your directions from Mr. Grindle? A. That's right.

Q. Is that correct, sir? A. Yes.

Q. And I understood you to say that Mr. Grindle frequently came to your part of the establishment to check the progress of your work?

A. Yes, he did.

Q. You mentioned that I think it was the first sample leaked. A. Yes, sir.

Q. Was it the first sample that leaked?

A. Yes.

Q. Could you tell us what was the cause of it leaking?

A. Well, at the time we were trying to glue

(Testimony of Herbert W. Montoya.)

all these real narrow strips together and we just couldn't get them glued—cut together—you know, cut straight enough and get them glued so that they couldn't leak.

Q. Was that because of the irregularity of the cuts or type of cement or both? [232]

A. It could have been both.

Q. It could have been both? A. Right.

Mr. Naylor: Thank you, very much, sir.

Mr. Hohbach: That is all, Mr. Montoya.

The Court: You may be excused, Mr. Montoya.

Mr. Hohbach: Mr. Chong.

RAYMOND A. CHONG

called as a witness for the plaintiff; sworn.

The Clerk: Please state your name and occupation for the record.

A. Raymond A. Chong, drafting supervisor, Pan American Airways.

Direct Examination

By Mr. Hohbach:

Q. You stated that you were drafting supervisor for Pan American. How long have you been in that position?

A. Approximately 12 years.

Q. Do you know Mr. Grindle? A. I do.

Q. How long have you known him?

A. Approximately ten years.

Q. Are you familiar with the dipsticks used by

(Testimony of Raymond A. Chong.)

Pan American? A. Yes; I am. [233]

Q. What was your first contact with the dipsticks?

A. I made the drawing for Mr. Grindle on this dipstick. That was my first contact.

Q. Did Mr. Grindle actually come in to see you?

A. Yes; he did.

Q. What did he bring with him?

A. He brought along a sketch and some square tubing and some round tubing.

Q. Did he describe to you how they were to be used in making up the dipstick?

A. He—well, I wouldn't have verbal instructions from him because his sketches—

Q. Were these pieces he gave you in a separate state?

A. They were loose parts, as I remember.

Q. Did you make a drawing of that after Mr. Grindle had requested you to make the same?

A. Yes; I made the drawing.

Q. Why did you make the drawing?

A. I do a lot of drawing. Even though I supervise, I do a lot of drawing and at that time this particular job was more or less a fill-in job for me; wherever I have time left over, then I would be on the board doing some drawing.

Q. Did Mr. Grindle show you any other drawing besides the sketches that he gave to you?

A. I don't recall seeing any other drawing. [234]

Q. How long did it take you to complete the drawing?

(Testimony of Raymond A. Chong.)

A. I can't say, because I do a lot of other work besides drawing. I may spend two hours one day or I may spend three hours the next.

Q. Do you remember that this drawing took you quite a long time to finish?

A. It did. Comparing to the job, I would say it took a long time.

Q. Is it a common practice to make advance prints of drawings at Pan American?

A. We have done that.

Q. Could Mr. Grindle have obtained an advance print of this drawing? A. He may have.

Q. You don't remember that?

A. I don't recall, no.

Q. Did Mr. Grindle make frequent visits to your department to check on the progress of this drawing? A. Yes; he did.

Q. What did you do when you had completed the drawing?

A. When a job is completed, why, I usually turn over all the information and whatever samples and parts I have back to the engineers.

Q. Can you generally describe the dipstick that you showed in the drawing? [235]

A. The dipstick is a square plastic shell with two round tubings at opposite corners with a wood filler in between.

Q. Would you be able to identify the drawing if I showed it to you? A. Yes; I would.

Q. I am now handing the witness Plaintiff's Ex-

(Testimony of Raymond A. Chong.)

hibit 8. Is this a copy of the drawing which you made up? A. Yes; it is.

Q. Does the drawing bear your initials?

A. Yes, it does.

Q. And what date did you initial the drawing?

A. June the 4th, 1948.

Q. What does that indicate to you?

A. This is the date that the drawing was pulled off the board, finished.

Q. Then the person that gave the work to you, does he sign at a later date?

A. That is up to the individual, whether he has time then it or not.

Q. Who signed the drawing after you signed it?

A. I see Mr. Grindle's signature as being the checker. Mr. Smith approved and Mr. Kiester approved it.

Q. Have you seen the original of this drawing?

A. The original vellum? [236]

Q. Yes. A. Yes, I did.

Q. Have you checked it recently?

A. Yes, I have.

Q. Does it show anything that is not shown on this copy of the drawing which I just gave you? I am referring to Plaintiff's Exhibit 8. Does the original show anything that is not shown on this copy of the drawing?

A. The original is exactly like this copy.

Q. Does it show anything that isn't shown on this copy? A. I don't quite get the question.

(Testimony of Raymond A. Chong.)

Q. Does the original have something on it which does not reproduce very well?

A. Yes, there are little erasures or ghost marks of the original dimensioning and information.

Q. You are able to read that from looking at the original and holding it up against the light—you were able to see what the erasures or deletions were; is that correct? A. Somewhat, yes.

Q. Did you transfer the information that you could read on that drawing to another copy of the drawing? A. Yes, I did.

Q. Are these the transfers that you made?

A. Yes.

Q. This was done—this is your own [237] handwriting? A. That is correct.

Q. It is shown in red pencil? A. Yes, sir.

Q. And these are the only things that you could read clearly, is that correct?

A. That is correct.

Mr. Hohbach: Your Honor will note there are several dimensions on here and reference to that No. 12 block which we have been speaking of, which was erased off of the drawing when they made the change.

Q. In other words, this portion here to which you have directed my attention is what Mr. Chong wrote in?

Mr. Hohbach: Right.

The Court: I see.

Q. (By Mr. Hohbach): You took this information from the original copy of the drawing; is that

(Testimony of Raymond A. Chong.)

correct? A. That is correct.

Q. That is not from your memory?

A. Not from my memory.

Mr. Hohbach: I offer this in evidence as Plaintiff's next in order.

Mr. Naylor: No objection.

The Court: Let it be received.

The Clerk: Plaintiff's Exhibit 26 in evidence.

(Whereupon, drawing referred to was received in [238] evidence and marked Plaintiff's Exhibit No. 26.)

Q. (By Mr. Hohbach): Referring to Plaintiff's Exhibit 8, was this drawing made for the particular purpose of putting a part number on the dipsticks? A. No, sir.

Q. What was the purpose of the drawing?

A. The purpose of the drawing was for manufacturing information which we send down to our shops.

Mr. Hohbach: That concludes the direct.

Cross-Examination

By Mr. Naylor:

Q. Mr. Chong, in connection with your last answer, it is a fact, is it not, that the number of the drawing—that you place upon the drawing, becomes the parts number? A. That is correct.

Q. Now, what is the practice in your department at Pan American with respect to making a

(Testimony of Raymond A. Chong.)

drawing? On that kind of paper do you make the original?

A. We make our drawings on vellum paper.

Q. That is pretty much conventional practice, isn't it, Mr. Chong? A. That is correct.

Q. And it is also the practice at Pan American, is it not, when changes are noted, or rather, when changes are made in the drawing, they are made on the original vellum? [239]

A. That is correct.

Q. And that drawing is made customarily in pencil, is it not? A. That is right.

Q. And there is a reason for that, isn't that right? A. That is correct, yes.

Q. To permit correction and amendment as required? A. That is right.

Q. Through the simple expedient of a soft eraser and then the addition of the amendment or the correction; isn't that the case? A. That is right.

Q. That is common drafting practice, isn't it?

A. That is right.

Q. Now, as I understand, it is also the practice of your department when changes are made to denote those changes and corrections in the upper righthand corner of the drawing?

A. That is right.

Q. In that event, the upper righthand corner becomes a chronological cataloguing, that is, a date by date cataloguing of any changes that might be made in the original vellum; is that correct?

A. That is correct.

(Testimony of Raymond A. Chong.)

Q. And so if we were to examine the print which has been introduced here as plaintiff's Exhibit 8 and we wanted to know [240] what changes have been made in the original vellum of that drawing, we would have an indication in the upper righthand corner, would we not?

A. That is correct.

Q. And we would add to that only the phantom marks that you were able to read and to add by red ink to Plaintiff's Exhibit 26 which you spoke about; isn't that true? A. That is correct.

Q. Am I clear on that? I am not trying to confuse you. A. Yes, that is correct.

Q. In other words, to follow the amendments to the vellum, we would look in the upper righthand corner of Plaintiff's 8 and we could then see those changes which had been entered on the original vellum? A. That is correct.

Q. That is correct, sir?

A. That is correct.

Q. And the only thing, then, that Plaintiff's Exhibit 8 does not show in the way of changes in the original vellum in this instance were the phantom marks that you were good enough to apply to the other print, Plaintiff's Exhibit 26?

A. That is correct.

Q. Now, Mr. Chong, you mentioned that Mr. Grindle originally brought to you three pieces of tubing and one or more sketches. Do you remember how many sketches there were? [241]

(Testimony of Raymond A. Chong.)

A. I can only picture one sketch. I can only remember one sketch.

Q. And can you tell the Court just what that sketch portrayed as you now recall it?

A. I can remember a rough cross-sectional view and it could have been a side view of the length—just a rough sketch of a long square bar.

Q. Those two views probably? A. Yes.

Q. Now, I assume from looking at Plaintiff's Exhibit 8 that the sketch given you by Mr. Grindle taught you how to make the drawing that you eventually made which is here reproduced by Plaintiff's Exhibit 8; is that correct?

A. You mean taught me?

Q. Taught you. In other words, it informed you—— A. Yes.

Q. ——as to what he wanted?

A. Yes, that is correct.

Q. And I understand that you didn't find it necessary to have any verbal instructions from Mr. Grindle about what was to be drawn; is that correct?

A. There would be—usually on a job there would be a lot of verbal instructions back and forth.

Q. There would be?

A. There would be. [242]

Q. I am sorry; I misunderstood you. I was under the impression that you felt the sketches were enough. A. No.

Q. But that wouldn't be the case?

A. That would never be the case.

(Testimony of Raymond A. Chong.)

Q. Thank you. Now, the conversation that would ensue in a situation like this we are talking about, would be that Mr. Grindle would hand you whatever material he had and whatever rough sketches he had and then some conversation would revolve around those things so that you could be informed as to the type of drawing that he wanted; is that correct, sir? A. That is correct.

Mr. Naylor: That is all. Thank you.

The Court: You may step down, Mr. Chong.

Mr. Hohbach: I have a couple of questions I would like to ask him. It will just take a moment.

Redirect Examination

By Mr. Hohbach:

Q. You spoke about making changes to the drawing. May changes be made to a drawing before it is officially released?

A. We continually do that. That will happen. We can be drawing and make a mistake in our dimensioning and we can be erasing and changing it, if that is what you mean.

Q. So a lot of these phantom lines and dimensions that are shown on this Plaintiff's Exhibit 26, I believe, could [243] have been made before the official release date; is that correct?

A. It could have been, yes.

Q. They also could have been after the official release, isn't that correct?

A. If the changes is to the extent where it affects

(Testimony of Raymond A. Chong.)

the part, then they would be recorded—that is, after the approval.

Q. After it is officially released, then you put the changes in the upper righthand corner; is that correct? A. That is correct.

Q. But before it is officially released, why, you could make changes in the drawing without recording it in a chronological sequence of events; is that correct? A. That is correct.

Mr. Hohbach: That is all.

Mr. Naylor: Nothing further.

The Court: We will take the afternoon recess at this time.

(Recess.)

Mr. Naylor: If the Court please, I would like the record to show that Defendant's Exhibit B for identification is now returned to the clerk. We have a copy. May it now be received as Defendant's Exhibit B?

The Court: So ordered. [244]

The Clerk: Defendant's Exhibit B in evidence.

(Whereupon, photostat referred to was received in evidence and marked Defendant's Exhibit B.)

HAROLD SCHMIDT

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name and occupation for the record.

A. My name is Harold Schmidt; flight engineer for Pan American World Airways.

Direct Examination

By Mr. Hohbach:

Q. How long have you been in the position of flight engineer? A. Since 1940.

Q. With Pan American?

A. That is correct.

Q. Will you give us a brief review of your technical background?

A. Well, I have an aeronautical engineering degree in 1938 and joined Pan American in '38 as apprentice engineer—junior engineer; joined, or was promoted to flight engineer approximately '44 and became assistant chief flight engineer, technical, which lasted until about 1952, and at that time I went back to regular flying.

Q. Do you know Mr. Grindle?

A. I do. [245]

Q. How long have you known him?

A. Well, I can't say in years, but I can place it in time. It was about six months prior to the time that we got the Connies, which I think was around '45.

Q. Are you familiar with the dipsticks used by Pan American? A. I am.

(Testimony of Harold Schmidt.)

Q. Did Mr. Grindle call you in to witness a destruction test on a dipstick? A. Yes.

Q. Did you have an opportunity to observe the dipstick that was tested?

A. Yes, I handled it quite a bit of the time.

Q. Would you describe this dipstick to us as you remember it?

A. Well, it was plastic with a square cross-sectional shape, with a couple of tubes in opposite diagonal corners, round tubes. It had a wooden filler which had the calibration paper wrapped around it, and had sealed ends of plates.

Q. Would you describe the calibrations in more detail?

A. The calibrations were placed on paper, the calibrations having lateral lines which have the—every so often they have the number of gallons which are in numbers, and also there is a distinction at the top of the stick that shows as to which tank the proper calibration is associated.

Q. How were the ends constructed? [246]

A. The ends were a piece of plate, plastic plate, approximately a sixteenth of an inch in thickness. They were cemented or glued in and they were cut out to fit into the cross-section of the square exterior tube, and they also had the corners cut out to allow the round plastic tubes to protrude—or, actually, “protrude” isn’t the word. They came out flush even with the end.

Q. Did you participate in the test?

A. I did.

Q. Would you describe this test to us?

(Testimony of Harold Schmidt.)

A. Well, we were——

Q. You said “we.” Now, who was present at the test?

A. Gene and I. We were—we met in the hangar, near the west side of the hangar on the floor—main floor, and about the central portion where the central entrance comes in. And the test comprised of two different parts. One was throwing it from a balcony. The balcony approximated or was a little in excess of the normal height of a wing.

Q. How high was that?

A. Oh, I would say it is at the point where we threw the stick from was probably about 20 feet, 18 feet. And the other part of the test, we threw the stick from the balcony onto the concrete deck trying to simulate dropping the stick, either intentionally or otherwise from the wings onto the ramps. The other part of the test involved throwing it against the [247] engine stand to see what abuse we could give it by introducing concentrated side loads on the thing.

Q. Did you throw the stick at any time yourself?

A. Yes, I did.

Q. Did the dipstick withstand the test?

A. No. It didn't.

Q. What happened to the dipstick?

A. The end—actually it withstood the test quite well, but we induced failure on one of the times that we threw it from the balcony. We threw it two ways: once in order to allow it to land lengthwise on the paving and the other to try to get it to bounce on the end as a lance would be thrown. At

(Testimony of Harold Schmidt.)

that time, why, we introduced a crack in the lower end of the dipstick. That extended roughly three quarters of an inch or an inch from the bottom diagonally up one of the flat faces of the external extrusion. It also—the impact caused the end of the little plate that was cemented in to conk out, say to roughly a five or ten degree angle.

Q. Did you ever test to destruction a dipstick in which the ends were not sealed?

A. No, I haven't. I was a pretty busy boy at that time and I wouldn't have been interested in a dipstick that didn't have sealed ends.

Q. I show you Plaintiff's Exhibit 9. Does this resemble the dipstick which you and Mr. Grindle tested? [248] A. Yes, it does.

Q. Does it differ from that in any way that you can recall?

A. The dipstick that we had did not have the blue ends on it; they used a different type of seal on it.

Q. Does this dipstick have an end plane in it?

A. Yes, it does. There is a section scratched away and you can see it.

Q. You distinctly remember an end plate in the sample which you tested?

A. Well, because we were able to look in and see the wood filler after it was broken loose by the force of the test.

Q. Could you tell how the wood filler was constructed after it had been broken open?

(Testimony of Harold Schmidt.)

A. You could see the end grain of it. The end grain was covered with a sealing material, yes.

Q. Do you specifically remember the sample you tested having only two tubes?

A. That's all I can recall that were involved.

Q. Can you fix an approximate date as to when this test took place?

A. It was several months after Gene had been hired by the company. He was a Lockheed representative before that time.

Q. Do you remember when Mr. Grindle was hired by the [249] company?

A. No, I would rather not try to specify the date; I think the records are available to show that.

Q. Was anything done about the ends after the dipstick failed in this test?

A. Yes, they were beefed up. The failure was induced from the wood tube or the wooden filler, the inertia of it carrying on from the external extrusion and it is a typical shear failure where the bonding and the end plate and the external square extrusion had to be sheared in order to allow the shift of the stick—of the filler stick.

Q. At the time did Mr. Grindle tell you what he was going to do to beef up the ends?

A. He didn't tell me right at the time. However, we discussed the fact that it was a shear failure and had to be strengthened at that end because the sticks would get considerable abuse in that manner so that the end plate would probably have to be beefed up in some manner.

(Testimony of Harold Schmidt.)

Q. Do you know what Mr. Grindle suggested for beefing up the ends?

A. Well, the final result, just the increased thickness of the plate which gave additional shear strength there.

Q. What was the use of the block? I mean to say, if you increased the thickness of the plate?

A. It gives us in direct proportion to the increased [250] area of the thickness of the side of the block, it increases the shear strength directly proportionally.

Q. Have you had any experience in plastics?

A. Just minor.

Q. Have you seen plastics used in the aircraft industry? A. Considerably, yes.

Q. Could you give us some examples?

A. Oh, we use it instrument panels, in windows in the cabins, interior trim—there is hardly any place you can look at in an airplane where you do not have plastic in some form or other.

Q. You have examined these plastic constructions at some time or other, is that correct?

A. Yes.

Q. Mr. Grindle suggested a thicker block. How would you make up such a block if you were making it up?

A. Well, if the material were available and I had to do it myself, I would probably cut it out of a thicker piece of material. [251]

Q. How else could you possibly make such a block?

(Testimony of Harold Schmidt.)

A. Well, I could laminate it or I could use a filler material that will solidify into a solid piece in itself.

Q. Do you know of your own knowledge whether it is common practice, if you don't have a material of the required size, to build up a block from laminations from material that is of less thickness?

A. We do it all the time. I have a mallet at home that I made up while I was an apprentice engineer that is still in use. It is made up of laminations of eighth inch plastic.

Q. Would any one of these blocks that you suggested—a solid block, a laminated block or just cement plugged in the ends—serve the same function in the dipstick?

A. Provided they were impacted and homogeneous I think they would have, yes.

Q. Is there a possibility that if you used laminations they might not be homogeneous or impacted?

A. The problem of lamination is always in securing a proper seal.

Q. So you might encounter additional problems if you used a laminated piece instead of a solid block; is that correct?

A. My mallet at home is coming apart now; I have got it wrapped with rubber tape to hold it together.

Mr. Naylor: I didn't hear that last.

(Last answer read by Reporter.) [252]

(Testimony of Harold Schmidt.)

Mr. Hohbach: That concludes the direct of this witness.

Cross-Examination

By Mr. Naylor:

Q. Mr. Schmidt, I take it from what you said that you have had no technical training in plastic materials; is that correct? A. That is correct.

Q. May I ask you also if you have had any technical training or educational background in the chemistry of plastics? A. Moderate, yes.

Q. In what way?

A. Chemistry—the original chemistry courses we took in the University of Minnesota.

Q. Since that time have you taken any courses in the chemistry of plastics?

A. I haven't taken any courses, no, sir.

Q. Now you stated in direct examination, as I understood it, that it would be a very simple matter to beef up, as you put it, the end of these dipsticks, by cutting a piece or a plug out of thicker material; is that correct?

A. That is the only conceivable way, is to increase the shear strength in that area, because that was the type of failure that occurred.

Q. And assuming that you could find a thicker piece that could be cut that was satisfactory, you would still have the problem of finding a suitable cement or adhesive, would you [253] not?

A. I think the same thing would be—I don't think I would have any trouble in finding it, no.

(Testimony of Harold Schmidt.)

Q. You don't think you would have any trouble?
The answer is that you would not?

A. You asked if I thought I would have any trouble. I say I think I wouldn't have any trouble.

Q. You think you would not have any trouble.
Now do you know anything about the practices of extrusions in the plastic industry?

A. No, I don't.

Q. Do you know anything about the extrusion of hollow bodies or tubular members?

A. From a layman's standpoint, yes.

Q. Do you know anything about the problems of o.d.—and you follow me when I say o.d.?

A. Yes.

Q. I mean outside diameter.

A. That's right.

Q. The problems of controlling o.d. dimension of an extruded body?

A. That has never been my problem.

Q. And would your answer be the same about the i.d., meaning the internal diameter?

A. It has never been my problem. [254]

Q. And I take it that since it has not been your problem, you have no personal knowledge of the difficulty of the extruders in maintaining these tolerances of extruded bodies; is that correct?

A. No, I have no personal knowledge; just generalities.

Q. Now I understood you to say that you had specific experience with block lamination. What was it that you laminated?

(Testimony of Harold Schmidt.)

A. We took, I think it was, flexiglass at the time, it was common material we had, and we used a solvent for it which we had on hand, and placed a number of the pieces together to make a square block and set them under a hydraulic press and left them there to solidify, and after several days we used the block which we had made to machine or turn out a mallet head.

Q. Was it that mallet head that you said is now held together with tape?

A. That is correct.

Q. And to what do you attribute the necessity for taping it?

A. Because the laminations are beginning to separate because it has received so much abuse as a mallet.

Q. Would you say that that was caused by a failure of the choice of cement?

A. I think so, yes.

Q. Now there would also be the problem of choice of cement [255] and the materials in making a lamination for the end sealing of a dipstick, would there not? A. Yes.

Mr. Naylor: That is all.

Mr. Hohbach: That is all.

Your Honor, that concludes the testimony from those three witnesses, but I understand that Mr. Naylor also has a witness here in court he would like to get on this afternoon.

Mr. Naylor: I do, your Honor, and Counsel has been very kind to suggest, in response to my ad-

vising him that this gentleman is not connected with either party to this case, and his employment requires him to leave for Los Angeles Monday morning—he deferred one trip already on account of this trial. He will be a very short witness.

The Court: I have no objection.

Mr. Naylor: Mr. Rollins.

VERNON C. ROLLINS

called as a witness by the defendant, out of order, sworn.

The Clerk: Please state your name and occupation for the record.

A. Yes. My name is Vernon C. Rollins. I work for the Archer-Daniels-Midland Company.

Direct Examination

By Mr. Naylor:

Q. Mr. Rollins, would you be good enough to state your educational background, sir? [256]

A. Yes, sir. I am a graduate of the University of Southern California with a degree in architecture with a minor in chemistry. I was employed approximately nine years with Monsanto Chemical Company in a plastics capacity. I graduated from their school at Springfield, Massachusetts, incidentally.

Q. Springfield, Massachusetts?

A. That's right, sir.

Q. And when did you attend their school at Springfield, Massachusetts?

A. In 1945, sir; from August, 1945, until December of that year.

(Testimony of Vernon C. Rollins.)

Q. And were you then employed by them in plastics specifically? A. I was, sir.

Q. And for what period of time did you remain with Monsanto?

A. I was with Monsanto until March of 1950.

Q. And did you then accept employment with Archer-Daniels-Midland?

A. I did, sir, in their chemical products division.

Q. And you are now so employed?

A. I am.

Q. May I ask if you are testifying here under subpoena? A. I am, sir.

Q. Thank you. In your experience, Mr. Rollins, did you come into contact with the problems of extrusion of hollow [257] plastics bodies?

A. Yes, sir.

Q. And was that in the regular line of your work at Monsanto?

A. From a technical capacity, yes, sir. I was primarily a salesman, but salesmen had to become technicians.

Q. You were a technician-salesman, actually, weren't you? A. That's right.

Q. I would like to ask if you are acquainted with Mr. C. Martin Welch, the defendant in this action?

A. Yes, sir.

Q. Can you state for what period of time you have had an acquaintance with him?

A. I have known Mr. Welch for approximately ten years.

(Testimony of Vernon C. Rollins.)

Q. Did Mr. Welch ever come to you in a customer relationship with a specific problem that he had in plastics? A. Yes, sir.

Q. Would you state approximately when this occurred?

A. The nearest to my recollection, it would be 1948.

Q. And what part of 1948 would that have been?

A. I should say about the middle of 1948—the first part to middle of 1948.

Q. Did Mr. Welch identify to you, Mr. Rollins, the subject matter with which he was concerned?

A. He did.

Q. And what was it, please? [258]

A. Mr. Welch came to me with a problem of sealing the ends of a—I believe you have called it a dipstick, in which the problem of an integral and homogeneous sealing of the ends of this dipstick in order to prevent, I believe it was, gasoline from permeating into the interior portion of this particular stick. He showed me an extrusion that he had, and his particular problem was to give a very tight seal on either end of this square tube, I believe it was.

Q. I will show you at this time, Mr. Rollins, an assembly for an outer tube, inner tubes and a spacer member, and will ask if that corresponds approximately to the dipstick assembly that Mr. Welch showed you?

A. Yes, I believe that's—

Q. Is that a fair example of it, would you say?

(Testimony of Vernon C. Rollins.)

A. I would say it is, sir.

Mr. Naylor: May we offer that, your Honor, as Defendant's next in order?

The Court: So ordered.

The Clerk: Defendant's Exhibit D in evidence.

(Dipstick assembly marked Defendant's Exhibit D in evidence.)

Q. (By Mr. Naylor): Did you undertake, as a result of this request by Mr. Welch, to offer any suggestions drawing on your experience for the solution of this problem?

A. I did, sir. [259]

Q. Would you mind telling the Court what was your first suggestion?

A. Yes. When Mr. Welch came to me he showed me this particular problem that he had, and since Monsanto Chemical Company was a large chemical group which had several divisions, in one of which were plasticisers, we were very interested in the possibility of assisting him in using possible plasticiser plastics, and perhaps even a solvent addition to a given thermoplastic material in order to actually form this particular product in the end; in other words, to actually pour this material in as if it were a rather heavy viscous liquid so that it would completely seal the end of the tube, and to that end we were trying to assist Mr. Welch in that particular category.

Q. Did you come forth with a specific suggestion to Mr. Welch in that regard?

(Testimony of Vernon C. Rollins.)

A. Yes; we tried several things, one of which we were in hopes that we possibly could take and make up a plasticised material, which is somewhat familiarly known to the trade as a goop; in other words, a very viscous——

Q. How do you spell that, Mr. Rollins?

A. G-o-o-p. It is more or less a colloquialism, your Honor. But at any rate, we were hoping to make up a type of goop in which we would use plasticisers and solvents in order to make this material be able to be poured into the ends of the [260] tube and subsequently the material would harden and form a tight seal.

Q. Now, you communicated that suggestion, I presume, to Mr. Welch? A. I did.

Q. And did Mr. Welch report to you whether or not that particular suggestion had been followed?

A. Yes; he tried to use the various materials that we offered in this particular quest of the case.

Q. And what was the nature of the report that you received?

A. Well, they were not satisfactory, sir.

Q. Could you tell us why, as you understood it?

A. Well, yes; as far as I can understand, in pouring this particular material into the actual end case, the end part of the tube, because of the exudation of plasticiser and solvent, it would cause distortion at the ends of the tube, and we found that we could not pot or pour this goop in here and make a satisfactory seal.

I would like to also add to this extent: That about

(Testimony of Vernon C. Rollins.)

this time we further discovered a material which is a cellulose acetate butyrate jell lacquer produced by the Tennessee Eastman Corporation. We hoped that this lacquer might possibly have a happier blend of solvents and plasticisers in order to give it a suitable jell-like structure without causing deformation at the ends of the tubes themselves. [261]

Q. This deformation of the ends of the tube, was that explained to you as a serious problem in any respect? A. Yes.

Q. Why?

A. Because it seemed to impair the accuracy of the stick, as far as I was able to understand.

Q. In other words, there was physical distortion, was there not? A. Correct.

Q. Now, Mr. Rollins, you mentioned a moment ago that in this second quest you were hoping that you would arrive at a happy blend. Would you mind explaining that expression to the Court?

A. Yes. We felt that since the Tennessee Eastman Corporation had done so much with cellulose acetate butyrate and cellulose acetate molding compositions, and their flat sheets, that perhaps this jell lacquer would be a more satisfactory material and might not cause the trouble of distortion at the ends.

But this material was unsatisfactory.

Q. And would you mind stating why, as you understand it?

A. Yes. Well, exactly the same situation occurred. What seems to be the phenomena of this

(Testimony of Vernon C. Rollins.)

particular jell lacquer is that it is a very satisfactory material if it can be [262] placed in rather thin membranes so that the actual exudation of plasticiser and solvent fumes are of such nature that they can escape readily.

But in this particular case you have a rather closely defined wall section, and as I have recollected this particular pouring or the thickness of this end plug, it was rather deep, and so much of volatile material is trapped within this narrow confined area that it had no other place to go but towards the sides of the tube, and, as a result, would cause distortion, acting as a solvent on it.

Q. That was the second suggestion, as I understand it? A. That is correct.

Q. Do you have any further suggestion to Mr. Welch?

A. No, sir; that is about the end of my—that is the end of the suggestions that I was able to offer to Mr. Welch.

Q. Beyond the suggestions that you gave Mr. Welch, did you extend him any aid or assistance in trying to find other materials that might lick this problem?

A. Yes; I suggested that if he would check with the Wilson & George Meyer & Company, who are the western representatives for the Tennessee Eastman Corporation, and that since the tubes themselves were butyrate in nature and since this particular company produced cellulose acetate butyrate for the extrusion, why, it was rather desirable

(Testimony of Vernon C. Rollins.)

that he check with them on the possibility of using sheet materials for [263] the ends of the tubes.

Q. And was it contemplated that one thickness of material or a plurality of thicknesses of material would be used?

A. I would say a plurality, sir.

Q. Now, once the decision was arrived at, or once the idea of lamination—I presume you mean lamination, do you not? A. Yes.

Q. —was arrived at, there remained, did there not, the problem of finding a compatible cement? A. That is true.

Q. With which to build that lamination; is that correct? A. That would be correct, sir.

Q. Now, did you have anything further to do with Mr. Welch's attempt to solve this problem?

A. I did not, sir.

Q. You stopped at that point? A. I did.

Q. And I neglected to ask you one question: Did you actually obtain from Wilson & George Meyer samples of the butyrate material in sheet form?

A. Not in sheet form; no, sir.

Q. Not in sheet? A. No.

Q. In any form?

A. I did. I obtained some jell lacquer from them on the [264] original work. In other words, when we were going to pour this material into the ends, I obtained those samples, yes, sir.

Q. Now, in the extrusion of hollow plastic bodies, has it come to your attention that the extruders have any problem in the matter of control of the

(Testimony of Vernon C. Rollins.)

o.d. and the i.d., meaning outside diameter and inside diameter of the hollow body?

A. Well, to take that up separately, the matter of outside diameter could be controlled rather accurately in extrusion.

Q. And how would one go about that?

A. After the material emerges from the orifice of the extruder itself, they can use an after—they call it an after forming die, and the material itself will progress from the end of the extruder and it goes through an after forming die, which is usually heated, so that this rather warm material can be re-sized, because there are definite limitations on plastic materials. They do have tolerances that have to be, you might say, fought rather rigidly in order to hold them as nearly right as possible.

Now I speak of from the outside of the tube, or the o.d. dimension that you mentioned. However, on the inside, to the best of my knowledge, there is no method of controlling that as accurately as it might be wished.

Q. And do you have any knowledge gained from your experience as to whether there is a variation in the i.d.—inside [265] diameter—of material such as is shown in Defendant's Exhibit D?

A. May I see that tube, sir?

Q. Yes, sir.

A. Yes. I would like to point out to the Court that these two critical diameters in the center are very, very difficult to hold. They are—in the actual—in the extruder's end of the world they are some-

(Testimony of Vernon C. Rollins.)

what of a nightmare to hold, particularly when fairly rigid tolerances are desired, and, as a matter of fact, the extruders fight that constantly and, to the best of my knowledge, they have never been able to control these diameters.

If this were a circular tube, of course, they would have the same difficulties.

Q. And your reference to circular tubes, would that be applicable to the small tubes that are contained within defendant's Exhibit D?

A. Yes.

Q. Now, Mr. Rollins, do you have any knowledge as to the order of tolerance that is encountered by extruders because of those reasons?

A. I would say that if you would be able to hold the inside diameter of a tube to from 15 to 20 thousandths, it would be——

Q. Considered all right? [266]

A. Considered extremely good.

Q. Now, upon the background of that testimony, I would like to ask you this question: If one were considering the production of a completed dipstick working on the partial assembly exhibited by Defendant's Exhibit D, would you say that the problem of sealing the ends could be met and solved by using a solid plug on each of the two ends?

A. Counsel, may I ask in "a solid plug," are you referring to a molded plug such as might be molded from an injection molding machine?

Q. Yes, sir.

(Testimony of Vernon C. Rollins.)

A. Then you would have a very difficult job, because——

Q. Would you mind explaining why?

A. Yes; I will be very happy to. In both cases you have dimensional tolerances to overcome, particularly when this area is critical, and I assume that it is, that when a plug would be molded to this particular size—and let us say that they ran through several sizes to try to take an approximately closely dimensioned plug—that batch to batch of the extrusions as they receive them from the extruder would vary enough so that these plugs would never be very tight; there would be a tolerance.

Q. Now, may I ask you, would it be a matter of trial and error in fitting such a plug into that assembly?

A. Yes, sir. [267]

Q. And in order to accommodate the plug, would there be perhaps a necessity in some instances to re-work the plug?

A. Yes; that would certainly be necessary.

Q. And I assume that, conversely, you would discard undersized plugs?

A. That is true.

Q. Is that a method that would lend itself to, well, let us say, commercial production of a structure such as we are discussing here by way of Defendant's Exhibit D?

A. No, sir; I would say that it wouldn't be, and, as a matter of fact, you would probably have to make a number of molds, or within a given mold you would have to make a number of sizes so that you could actually fit the commercial tolerances

(Testimony of Vernon C. Rollins.)

that you would find in the tubing delivered to you from the extruder.

Q. Now, I would like to ask you one final question. If it were decided that the ends of an assembly such as is partially exhibited by Defendant's Exhibit D, should be sealed off by a laminated type of plug, would there then be a problem with the variation of the tolerances of the internal diameter of the outer tube and the o.d. or outside diameter of the inner tubes?

A. Yes. If I may go back to that question rather thoroughly, Counsel, let us assume, for instance, that in starting a basic lamination that would go into there, you [268] could cut a series of flat laminations which would basically fit this structure—but, of course, in so doing, what happens is the type of cement that you would use would have to have such body so as to actually give the material homogeneity in not only between the layers of the laminate and the sidewalls of the tube itself.

Am I answering your question?

Q. Yes. In other words, it isn't just a problem of inserting a series——

A. No, no.

Q. ——or discs cut to the desired cross-section; is that what you are saying?

A. Yes; that is just exactly it.

Q. The problem still remains of finding a suitable, compatible cement?

A. That's right.

Q. Or adhesive; is that correct?

A. That's right.

Q. Now a final question: Would there be a tend-

(Testimony of Vernon C. Rollins.)

ency for the succeeding laminate members in that type of closure to adjust their dimensions and proportions to variations in the i.d. of the outer tube and the o.d. of the smaller tube as you progressively built up?

A. Yes, providing a suitable cement were used.

Mr. Naylor: That is all, your Honor. [269]

Cross-Examination

By Mr. Hohbach:

Q. Did Mr. Welch ever show you any drawings?

A. No, sir; I don't recall seeing a drawing on this particular project at all. This was strictly a case in point, Counsel.

Q. He actually brought you some dipsticks, did he? Did he just bring you this one dipstick?

A. Yes, I saw one; that's right.

Q. Did he ever show you any completed dipsticks?

A. I do not recall seeing a completed dipstick, sir.

Q. Did Mr. Welch ever speak to you about putting a plug in the end of the dipsticks?

A. No, sir; he did not, Counsel, because, in other words, my phase of the thing was strictly on jell lacquers and the possibility of making a plasticiser-solvent combination, which would make the material suitable.

You see, what we had hoped to do, Counsel—perhaps I am not being very clear, and I want to make

(Testimony of Vernon C. Rollins.)

it very clear to the Court, that what we had hoped to do originally was to actually take a plasticiser and the granules of materials themselves plus solvent, and make a mixture of these materials in order to form a very viscous type of—it is known now in the trade as potting compound.

Q. Isn't that a very general practice?

A. It wasn't then, although the cellulose acetate jell [270] lacquers were used for that type of job in very thin membranes.

Q. Isn't it a general practice that when you make up a cement you take part of the plastic and dissolve it in solvent to the desired consistency?

A. Well, generally speaking, you have to tailor a cement very carefully to a job that you are after. There are a number of commercial cements, but they have their limitations. To get desirable characteristics, you have to——

Q. You say you have to tailor it. What do you mean by that?

A. Probably the best way I can give you an analogy on that is to actually make several trial and error examinations of various types of solvents in order to get a material which will give you the best type of possible bond with the least amount of deformation.

Q. Isn't that information readily available in practically any textbook or magazine?

A. In wide generalities, yes, sir.

Q. Then the main problem is just selecting a solvent; then you take a quantity of this plastic you

(Testimony of Vernon C. Rollins.)

are interested in cementing together, dissolve it in the solvent to the desired consistency and use that; is that correct?

A. That is correct, with the one exception: That you certainly don't hit it usually, unless you are an awfully lot better chemist than many of our learned doctors, you don't hit that right off the bat; it takes a lot of [271] experimentation.

Q. Couldn't an ordinary mechanic working in a plastic shop make up a desired cement?

A. Surely, sir; he could, if he kept at it long enough.

Q. Well, in general, say the mechanic was experienced, wouldn't he, after he had been used to making cements, wouldn't it be pretty easy for him to arrive at the right solution with a very little effort?

A. I see the point you are driving at. Yes, with a starting approach—with a reasonably good starting approach, after probably several trial and error approaches, he would probably come out with a very satisfactory material. But I don't think he would hit it right off the bat. He would be awfully good if he did, or awfully lucky.

Q. Did Mr. Welch tell you at any time that the dimensions of these parts were critical?

A. Yes; he mentioned that they were of a critical nature.

Q. Did you know what he was going to use these materials for?

A. He was going to seal the ends of the tubes, sir.

(Testimony of Vernon C. Rollins.)

Q. Do you know that he actually had a fluid—wanted a fluid column to come up the small round tubes?

A. Yes, sir; I appreciate that from merely looking at it.

Q. Do you think it is critical what the inner diameter of [272] that tube is?

A. I would say probably the inner diameter of the square tube, if you are referring to the square tube, is very critical, yes.

Q. Let's start with the inner diameter of these round tubes.

A. The inner diameter of the round tube? I can't see any particular critical nature there. The outer diameter would be perhaps a little more critical.

Q. The only thing that is important is that it will pass a column of fluid; is that correct?

A. I would say so. The outer square portion, Counsel, is the very critical dimension and one which would give people no end of trouble unless it was correctly done.

Q. But Mr. Welch had no trouble at that time and his company was producing a suitable plastic extrusion at the time he first started making these dipsticks; is that correct?

A. I couldn't answer that question, sir; I wouldn't know.

Q. You stated it was rather easy to control the outside dimensions of the plastic extrusion?

A. That is correct, sir.

Q. Then you can safely assume that in 1948 that

(Testimony of Vernon C. Rollins.)

there was no problem at that time in the outside dimensions of the square extrusions and the round tubes?

A. On the outside dimensions of the square tube and the [273] outside dimensions of the small tube; that is correct. The inside dimensions are the point I would bring out most clearly where the difficulty arises.

Q. Do you know why Mr. Welch never considered using a block for sealing the ends of the dipstick?

A. No, sir; I imagine he had his good reasons; he felt that he probably couldn't hold dimensional tolerances.

Q. Did you ever suggest the use of a block to him?

A. I did not, sir. Mr. Welch is familiar with the molding techniques, I am sure, enough to realize the difficulties encountered. Molds are very expensive, Counsel, and——

Q. All right; let's go into that. How would you make a block, say, of 3/16ths inch thickness?

A. A block to actually seal the ends of that tube, sir?

Q. No; let's just say any block. Say it is an inch in diameter and 3/16ths of an inch in thickness.

A. Well, to begin with, the material is made from tool seal and in a die-making shop. Actually the die cavities themselves are either hobbled—that is a tremendous pressure that is put onto the seal when it is in an annealed condition, and these die

(Testimony of Vernon C. Rollins.)

cavities are formed under this terrific hobbing pressure. Many people in the plastics industry are familiar with that, but it is a very hardened hob which is actually forced under tremendous pressure into the die block itself. [274]

The second method probably used the greatest in the plastic industry is the fact that the dies themselves are machined out in halves, sir, and these particular blocks must match up exactly right so that when the die block is closed and the injection machine actually melts the granules of plastic material, and it is fed under hydraulic pressure into this particular die block—it is what is known as a sprue and a series of runners—and this is just merely a way to get the material into the actual section itself; it is under tremendous pressure.

Q. And you would only go to this expense if you were using a great quantity of that shape of plastic; is that correct?

A. That's right; any multiplicity of those blocks would run a die cost up to perhaps five to ten thousand dollars.

Q. How else could you make a block in that manner? A. Machine it out.

Q. You could also build it out of lamination; is that correct? You could make a cheap die and stamp it out of, say, thinner material and build it up to the desired size?

A. Let me draw a point there on lamination, if you don't mind me giving you a point, something that the Court should consider. Let us assume, for

(Testimony of Vernon C. Rollins.)

sake of argument, that you can take a series of laminates together under hydraulic pressure—heat and pressure will actually unite these materials. I am sure the Court is acquainted with that. [275]

But as these die cut pieces are placed under heat and pressure there is plastic deformation; in other words, the material would tend to exude right out, because of its thermoplastic nature it has a tendency to flow slightly, so that unless the blocks themselves were held into a very tight orifice, somewhat like a die—and not a cheap one either—why this heat and pressure would cause deformation on that plug and it wouldn't fit anything, not alone that particular plug.

I hope I am making that point clear.

Q. Say if you did want to make a plug—you pointed out that when you first were using this cement that you had trouble with deformation at the end and sort of pulled out the end because of the evaporation of the solvent in the cement, is that correct?

A. Yes; that would be in the case of a jell lacquer or something that you would pour.

Q. What if you made a block that just loosely fit into there and filled it with cement? Do you think that would work?

A. I would not feel very—I wouldn't feel very safe in offering it to Pan American or any other airline.

Q. Why not?

A. Well, because I would feel that a block that

(Testimony of Vernon C. Rollins.)

would loosely fit that particular orifice and it were not a very close fit would have a tendency to pull out. It wouldn't [276] be able to stand the tests, I believe, that were mentioned earlier.

Q. You stated you could fill the whole end with cement, did you not?

A. With a jell lacquer. Now a jell lacquer becomes an integral plastic, Counsel. In other words, all a jell lacquer is is merely a plasticised thermoplastic material that is in a viscous nature, yet pourable.

Q. Dissolved in a solvent?

A. Dissolved in a solvent that makes it pourable, and it would go in and fit this particular orifice very nicely.

Q. Well, assume you used that material and use a block which had been roughly fit in there, would that work?

A. That is a very difficult question to answer.

Q. Isn't it going to——

A. It possibly could work, but it would seem to me here if we had this jell lacquer before that was giving the trouble from exudation of plasticiser and causing deformation, it would seem to me that we are getting right back to the same situation again.

Q. Except that you have a much smaller quantity of this solvent which is evaporating and you wouldn't have the amount of solvent evaporating out——

A. Yes.

Q. And it wouldn't draw in and stick as much?

A. That could possibly be true. [277]

(Testimony of Vernon C. Rollins.)

Q. And you would still form a good bond between the block and the sides of these square extrusions, would you not, because the solvent would have a tendency to dissolve part of the block and part of the outside of this square extrusion; isn't that correct?

A. Depending on if the solvent were right so that it didn't cause deformation.

Mr. Hohbach: That is all. [278]

* * *

EUGENE L. GRINDLE

the plaintiff herein, recalled for redirect examination.

The Clerk: You are under the same oath as previously.

The Witness: Take that again?

The Clerk: No; you are under the same oath.

Redirect Examination

By Mr. Hohbach:

Q. Mr. Grindle, you stated on direct examination that you had first discovered that Mr. Welch had patented the dipstick on September 28, 1953; is that correct? A. That is correct.

Q. What did you do immediately after [281] that?

A. The first thing I did is tried to call Mr. Welch on the phone. I believe it took—he wasn't in his office, he was out of town or something and I

(Testimony of Eugene L. Grindle.)

left a message with his secretary to call me back, which he did in a matter of two or three days, and I discussed with Mr. Welch the present number that he had on his stick and asked him how come, and so on, and he rather adamantly stated that it was his invention and he didn't know what I was interested in, what possible claim I had to it.

Q. What did you do after you had contacted Mr. Welch?

A. Right after that, then I was more or less satisfied with what Mr. Welch's attitude was, and I went to our engineering files and collected the file on the dipstick program there and reviewed it.

Q. Did that take a considerable period of time?

A. Oh, I would say it took several days revealing all that correspondence and things that were in the file, and because of the—as a result of that review, I recollected from that that Mr. Welch had increased the price on the dipstick two or three times in the first six months of our association with him, that he possibly would have increased it again, so our next step was to go to our supply department and get the latest price that Mr. Welch was charging Pan American.

Q. Did you ask the supply department to do anything?

A. Not at the time. I just got that for my own information; [282] before asking the supply department to do anything I wanted to review that with our attorney at Pan American.

(Testimony of Eugene L. Grindle.)

Q. Did you take the matter up with the attorney at Pan American?

A. Yes, I did; after I had this price, which was at the time \$12.50 a piece for the dipstick, I took the file up and reviewed it with Mr. Fox, Pan American attorney.

Q. On direct examination, did you state that you had been remiss in not mentioning that there had been a prior drawing of the extrusion?

A. Yes, I believe I made that statement.

Q. What did you mean by that?

A. Well, I considered the completed dipstick drawing as the original drawing. I believe Mr. Welch had reference to the original extrusion drawing, which was not a complete drawing but merely covered the extrusion. So Mr. Welch referred to that particular drawing as the original instead of the first completed drawing. In my opinion the complete drawing was the original drawing of the dipstick.

Q. Was there a copy of the drawing of the extrusion in the file that you had given Mr. Fox?

A. Yes, there was; the original was in there.

Q. Do you have any understanding as to what Mr. Fox did at that time?

A. Well, Mr. Fox and I discussed the entire program and [283] decided that one of the first steps to do would be to get a total survey of Pan-American and the other three—all three divisions, to see how many dipsticks Pan-American had bought and paid more than \$5 for. So we went to the supply

(Testimony of Eugene L. Grindle.)

department and asked them to contact the other divisions and get a complete survey of all the dipsticks that were ordered at a price more than \$5.

Q. About how much time did that take?

A. Oh, I would say that took a couple of months to get the complete survey made.

Q. Do you know whether Mr. Fox at any time talked to Mr. Welch?

A. I believe in the meantime there that Mr. Fox did talk to Mr. Welch. I believe he talked to him altogether on two occasions; I don't know the exact time, but I believe it was within this, oh, one or two months' period that we were waiting for this cost study to be made.

Q. Did Mr. Fox ever turn the file back to you?

A. Yes, he did. He turned part of it back earlier and he kept some of the things that he thought would be pertinent to Pan American's interest of overcharges, and I believe the drawings and things like that that didn't particularly pertain to his interest he returned very shortly.

Q. Do you recall approximately when he returned this file to you? [284]

A. Oh, I believe it was probably a couple of weeks after I had first taken it to him.

Q. That was before you had received information on all the overcharges from the other Pan American division; is that correct? A. Yes.

Q. What did you do after that?

A. Well, you mean after the overcharges were——

(Testimony of Eugene L. Grindle.)

Q. After you received——

A. After the cost survey was made, after I received the file?

Q. After you received the file from Mr. Fox.

A. Well, one of the first things I did was to start compiling a cost study myself to see what they would cost me to manufacture them; and I wrote to Mr. Welch's company and I wrote to other plastics companies and got an estimate from a mill company to run the wooden fillers for me and estimates from a printing company on the scales, and my production manager took the thing and gave me an estimate on the cost of assembly.

Q. Did Pan American make a cost study of that at the same time?

A. Pan American made a cost study at some time later after the cost survey had come in from the other divisions, some time after that. [285]

Q. About how long after September 28, 1953, did this occur?

A. The Pan American cost study?

Q. Cost study; that's right.

A. Well, I would say it was some time near the end of '53 or early '54 that Pan American made their cost study.

Mr. Naylor: Could you fix the time when Mr. Grindle's independent cost survey was made? That is what you are getting at, I assume.

Q. (By Mr. Hohbach): When did you make your cost study, the independent one?

A. Well, very early in October of '54. The first

(Testimony of Eugene L. Grindle.)

things I did on that was to go to our supply department and the plastics catalogues and get a rough estimate of plastic materials and extrusions and so on, and we stocked materials similar to what we were going to use.

Q. In what year did this occur? A. 1953.

Q. Did you state previously that it was 1954?

A. If I did, I was mistaken.

Q. What did you do? You said you went and got supply catalogues.

A. Well, I got a very rough idea of what the extrusions would cost from similar materials that we had in stock and had the prices on.

Q. When did you consider actually taking action against [286] Mr. Welch?

A. Well, as soon as my—or Pan American's attorney advised me that they would not pursue the overcharges against Mr. Welch, which was some time in the late part of '53 or possibly January of '54—when they had completed their investigation and advised me that they would not pursue the overcharges and told me that if I was interested in the patent angle that I could pursue it myself, so it was at that time that I decided to take action against Mr. Welch myself.

Q. At this time had Pan American decided that they were not going to produce the dipsticks themselves? A. Yes.

Q. What did you do after you decided to take action against Mr. Welch?

A. Well, right at that time, in December of 1953,

(Testimony of Eugene L. Grindle.)

I was called over to work on a project in engineering, a special design project which I was engaged in for about three months working night and day and week ends and everything, and I just didn't have any spare time, so it was some time after that project, which I had left in the first of March of '54, before I actually was able to devote any efforts towards this dipstick program.

Q. What was this design project? Are you free to reveal that? [287]

A. Yes. Pan American was engaged in a complete redesign of the cabin interior to incorporate what we call a combination service, where we have a bulkhead in the airplane that is movable through various locations in the airplane so that you can change the ratio of first-class passengers to tourist passengers. The removable bulkhead part of it was a rather tricky design in that it had to take considerable stresses and had to be easily movable, and I was assigned to design that bulkhead.

Q. And so you were very busy then until March of 1954 in designing this bulkhead; is that correct?

A. I was very busy.

Q. What did you do after that?

A. Well, as soon as I had some free time I was called in to discuss another patent matter with my attorneys, and I at that time, in talking to Mr. Flehr, mentioned this dipstick situation and just discussed it in a preliminary fashion at that time.

Q. What occurred after that?

A. Well, shortly after that he referred me to

(Testimony of Eugene L. Grindle.)

you to discuss the thing further. And I came in and discussed it with you, and you asked me to get the file together so you could see it. And I brought the file in to you. You spent some time reviewing that, and one of the first things you asked me to do was to get this release from Pan American. [288]

Q. Then at all times you were proceeding as expeditiously as possible against Mr. Welch; is that correct?

A. I believe I was doing everything I could to pursue the action.

Q. You will recall that the complaint in this action was filed on March 5th of 1955; is that correct?

A. Yes.

Q. What had you done prior to that time to prepare yourself and the Deterget Corporation for entering into the manufacture and sale of dipsticks?

A. Well, I had prior to that time completed a cost study of what it would cost me to make it, and I had worked with my production man to develop simple tooling and jigs and things for manufacturing them. I had built a few samples of dipsticks to be sure what I was doing, and I had discussed this with my financial people in Belmont to see if they would be interested in the dipstick project.

Q. Had you seen your attorneys?

A. And I had seen my attorneys regarding what course of action I should take and could take legally and so on.

Q. You incurred considerable legal expenses by that time?

(Testimony of Eugene L. Grindle.)

A. I sure did. And I had also at that time given the corporation an oral license to manufacture the dipsticks, which I understood was an act of infringement.

Q. Had your counsel advised you that such an oral license [289] was an act of infringement?

A. Yes; they had.

Q. Had you made up your mind at that time that you were going into the manufacture and sale of dipsticks?

A. I had made up my mind considerably prior to that that I was going into the dipstick business.

Q. Did you have any means available to manufacture and sell dipsticks at that time?

A. I had adequate means available, the same means that I have today.

Q. You had these friends that you could have obtained financing from; is that correct?

A. I had been financed by this group before and had adequate finances available.

Q. On direct examination you stated that you could have sold about 3,500 dipsticks per year. How many dipsticks has Pan American purchased since September 28, 1953?

A. Well, I don't know the exact number, but the last survey I made they were buying at the rate of about 600 a year, and with a new airplane coming out in the very near future there would be considerable orders—several hundred for the first order.

Q. Is there any doubt that you could have had

(Testimony of Eugene L. Grindle.)

Pan American's business if you had been manufacturing and selling dipsticks?

A. There is very little doubt that I would get the business. [290]

Q. I am showing the witness, Mr. Grindle, Plaintiff's Exhibit 26. Have you seen this exhibit before?

A. Yes; I have.

Q. Could you explain the sequence of the end constructions that are shown on this drawing?

A. Yes. If your Honor would like to look at it—it is a marked up drawing. Because some of the erasures and things on a drawing do not show through on a print, we had Mr. Chong of Pan American transcribe the markings from the original vellum where you could read them, and that shows that originally on this dipstick, prior to the release date of June 7, 1948, that these ends—both ends of the dipstick were plugged with thin plugs a 32nd of an inch thick and cemented in place.

The Court: Is this exhibit the same exhibit that Mr. Chong testified about?

Mr. Hohbach: Yes, it is.

The Witness: Yes.

The Court: And this was the exhibit where I believe he testified that he had made certain erasures.

Mr. Hohbach: The erasures were on the vellum.

The Court: Were on the vellum; I see.

Mr. Hohbach: They were transferred to here and shown in red on this Plaintiff's Exhibit 26.

(Testimony of Eugene L. Grindle.)

The Court: I think we have seen this [291] before.

Mr. Hohbach: Yes, your Honor, you have, but Mr. Chong did not at that time explain the significance of these markings.

The Court: All right.

Q. (By Mr. Hohbach): The advance copy that was given to Mr. Welch did have the——

A. The advance copy that was given to Mr. Welch called for thin end plugs.

Q. Did the sample dipsticks submitted by Mr. Welch have the thin end plugs in it?

A. Yes, it did. The sample that Mr. Schmidt and I tested to destruction had the thin end plugs in it.

Q. What is the next end construction that is shown on the drawing?

A. You recall, as a result of our destruction tests out there where the end was revealed to be the weakest part of the stick, we called for increasing the thickness of that end block up to 3/16ths of an inch in order to get adequate bonding strength and shear strength in that end plug, and the drawing then as originally released, officially released when it was officially signed and accepted, incorporated a block in each end 3/16ths of an inch thick.

Q. Where is the block shown in the drawing?

A. The block was called this dash-12 block, two required, one on each end, telling how to cement them in place, and the dimensions here, this 3/16ths

(Testimony of Eugene L. Grindle.)

inch dimension shows the [292] thickness of the block.

Q. What is the manner specified for cementing?

A. It calls for AN-C141 cement, which is an Army and Navy specification.

Q. Is the block shown on the bill of material?

A. The block is shown on the bill of material and it calls for the same material that is used in the dipstick plastic, that is, cellulose acetate butyrate.

Q. And that has been deleted by the "A" change, is that correct?

A. Yes. As I testified earlier, Mr. Welch, when he delivered the first dipsticks, did not incorporate the block; instead he filled the ends with cement, and the drawing was changed in order that they could be accepted so that the dash-12 block was deleted by this "A" change and they substituted filling the end with cement the way Mr. Welch did it on the first ones.

Q. Why did you make this change?

A. Only so that the dipsticks delivered by Mr. Welch could be received because prior to that, authorizing that change, the inspection department could not receive them because they were not manufactured in accordance with the drawing.

Q. And that's the way the drawing stands today; it calls for the ends to be filled with cement; is that correct?

A. Yes; there were no further changes made to this drawing.

(Testimony of Eugene L. Grindle.)

Q. When you wrote the letter of June 10th, 1948, in what [293] capacity were you acting?

A. I was acting strictly in the capacity of a Pan American employee.

Q. In that letter—that was a letter in which you——

A. That was a letter that I testified here was solicited by Mr. Welch and which I had asked for and obtained approval from my superiors to write the letter to Mr. Welch granting him permission to sell the dipsticks to other operators.

Q. You weren't acting for your own personal interests at that time, were you? A. I was not.

Q. Were you a party to the agreement in that letter? A. I was not.

Q. Did Mr. Welch at any time discuss with you the construction of the ends of the dipsticks—of his dipsticks?

A. Yes. The first time we discussed the ends naturally was when he delivered the dipsticks on our original purchase order with the ends filled with cement instead of incorporating solid plugs, and at that time Mr. Welch mentioned some difficulty in producing the plugs for the ends, primarily because of tolerances or something in the extrusion.

Q. At what time did this occur?

A. Well, that occurred probably a day or two, or possibly the same day that he had delivered the original, or partial delivery of the original [294] order.

(Testimony of Eugene L. Grindle.)

Q. You were present at the time the first dipsticks were delivered; is that correct?

A. I wasn't present, but I was called in by the receiving inspector.

Q. You didn't actually see Mr. Welch at that time? A. No, I didn't.

Q. Then Mr. Welch discussed with you at some later time the problem that he was having with the ends?

A. Yes. I believe that I contacted him immediately and asked him why he didn't make the sticks in accordance with the drawings, and at that time I believe he made a trip out there to explain the difficulty he was having.

Q. Did you at any time give him any suggestions as to how he might overcome his difficulties?

A. Well, we had discussed that problem quite thoroughly and I wanted to know why he couldn't make the thing in accordance with the drawing, and he said that it would have required some infinite number of different sized end plugs to accommodate the tube. He said that he thought he could do a better and more practical and cheaper job filling it with cement, and he thought he could control it better than he had on the original order. So Mr. Welch, being in the business, if he could make a dipstick filling it with cement that would be satisfactory, we would have accepted it.

Q. Did you give him any suggestion at the time as to how he [295] could overcome this problem?

A. Well, as far as suggestions other than what

(Testimony of Eugene L. Grindle.)

were called for in the drawing—there was a discussion in his workshop at one time regarding using solid plugs or making them up out of laminated sections in order to displace some of the cement. The quantity of cement that he had to use in the ends was what was causing the shrinkage and distortion of the tubes. That was some time after the original order was filled.

Q. Your original drawings showed the use of end plugs; is that correct?

A. The original drawing as officially released and on which the first purchase order was based called for plugs in the end 3/16ths of an inch thick.

Q. That is Plaintiff's Exhibit 8?

A. Right.

Q. In your opinion, would using end plugs of this type have posed a problem to a workman skilled in the art of plastics?

A. It wouldn't have incurred any problem, but with Mr. Welch's facilities it would have incurred some expense if he had to go out and have die or tooling made up so that he could make these plugs in a production manner.

Q. He could have had them machined, is that correct?

A. He could have had them machined or molded or extruded or sliced or various ways.

Q. How much would it cost to machine plugs of this type? [296]

A. Well, I have machined a considerable number of the plugs now myself or in our shop, and I

(Testimony of Eugene L. Grindle.)

estimate that to machine a solid plug 3/16ths thick would cost about five cents apiece.

Mr. Hohbach: Your Honor, we would like to demonstrate the completion of the ends of the dipstick. It will take but very little time and I would like to demonstrate at this time.

The Court: Very well.

The Witness: There was considerable discussion, your Honor, here, at the last day of this trial in which the problem of sealing the ends of this dipstick were represented as being a very difficult application in plastics and I would like——

Mr. Naylor: May I have your Honor's permission to go in the jury box?

The Court: Yes.

The Witness: I would like to assemble a dipstick here which I consider is assembled in direct accordance with the original drawing, and you will just see how difficult it is.

Q. (By Mr. Hohbach): Will you explain what you have here first before you start working so it will be in the record?

A. Well, first of all, I just made up this little standup for this demonstration here. But we have a sample stick here now that is made up, and this end here has a solid 3/16ths of an inch plug. As you see, it is loose in there. The opposite [297] end here has three thin laminated plugs.

Q. What is inside of the square extrusion? Will you explain that?

A. Well, there is a paper calibration cemented

(Testimony of Eugene L. Grindle.)

to a wooden filler. The wooden filler is cut out to very closely the same shape as the plugs are for the ends and that slide into the square extrusion.

Q. You have two tubes that fit within the square extrusion and the filler; is that correct?

A. Yes; that is exactly in accordance with the drawing, Plaintiff's Exhibit 8.

I would like to mention here as far as tolerances are concerned, that my fingernail is 22 thousandths of an inch thick. It slides in there very easily all around, so that the tolerances as far as the extrusion are concerned, in my estimation, are no trouble at all. That plug could be larger and still go in there; it could be smaller and still do the job of sealing.

Q. Could you explain the difference in diameters between the rounded corner diameter and the diameters of the——

A. Yes; the square extrusion is produced with a diameter cornered radius of about an eighth of an inch—I'm sorry; it is a 16th of an inch radius; and the round tubing that is accommodated in that corner has an external diameter of a quarter of an inch or an eighth inch radius, so that there is [298] no contact actually in the corner. So that has to be deformed slightly in the sealing process in order that the corner will seal. Would you like to look at it?

Q. So it would be impossible to get a perfect fit of the end plug anyway because the round tubes did not fit perfectly into the square extrusion?

(Testimony of Eugene L. Grindle.)

A. That's right. A perfect fit is not necessary at all. There was some discussion here on the last day that it seemed that the man testifying here considered that each plug would have to fit in an extremely tight manner, a press fit—a so-called press fit, which would have been, I grant, extremely costly because you would have to make a plug for each particular piece of tubing.

Q. But actually all you need is a plug that just fits loosely in there; is that correct?

A. That is correct.

Q. And the main purpose of the plug is so you won't need as much cement so that when the solvent evaporates it won't—

A. Yes; the thickness of the plug is what we determined after our destruction tests is required to get enough bonding area in the end to give you the strength required.

Q. Will you explain what you have in the plugs?

A. I would just like to line up that particular end before I seal it. These bottles consist of a cement—there is just a cement in this bottle which is made up of shavings of [299] cellulose acetate butyrate and mixed with a suitable solvent in order to provide a cement of the desired consistency. This bottle here is just a solvent—a recommended solvent for the particular plastic we are dealing with.

Q. What is the solvent?

A. The solvent I am using here is ethylene dichloride.

Q. Was that solvent available in 1948?

(Testimony of Eugene L. Grindle.)

A. That solvent was available and that solvent was the solvent recommended in the plastics handbook at the time for this material.

Q. I hand you a piece of paper that is identified as Plastics Identification Chart 1947. Is ethylene dichloride shown on that chart?

A. Yes, it is. This particular chart is for the purpose of identifying plastics and recommending solvents for the particular plastics, and right up here is cellulose acetate butyrate.

Q. Which is the first one on the list?

A. The first one on the list, the plastic we are dealing with, and ethylene dichloride over here is recommended as a solvent.

Q. The "S" means that it is soluble in ethylene dichloride; is that correct?

A. "S" down here means soluble. Now there are a couple of other materials here that are suitable solvents for this [300] plastic, but ethylene dichloride is something that we stock and we are familiar with at Pan American.

Q. So all you had to do to make a cement, you would have to look to this chart to find a suitable solvent; is that correct?

A. That is correct.

Q. Did you look at this chart yourself in 1948?

A. Yes, I did.

Q. What date does this chart carry?

A. 1947.

Mr. Hohbach: I will offer this in evidence as the plaintiff's next exhibit.

The Witness: Why don't you let me seal this

(Testimony of Eugene L. Grindle.)

one and then you can talk further while that is setting?

The Court: Do you want to offer that in evidence?

Mr. Hohbach: I will offer it in evidence.

The Court: Let it be received.

The Clerk: Plaintiff's Exhibit 27 in evidence.

(Whereupon, *Plastics Identification Chart 1947* referred to above was received in evidence and marked Plaintiff's Exhibit No. 27.)

The Witness: Can I go ahead, Al?

Mr. Hohbach: Sure.

The Witness: What I want to do here, your Honor, is get this set up, because it takes about half an hour in the mold [301] before you can actually—this won't stain your table; I just want to dip it in here to the depth——

Q. (By Mr. Hohbach): You are dipping it into the jar of cement; is that correct?

A. That is correct.

Q. To what depth?

A. Just to the depth of those end plugs.

Q. How long will you leave it there?

A. I will leave it there for approximately 15 seconds. The time on this is important only to get the softening of the plastics. Now I just force that into this mold.

Q. The mold is roughly the shape of the outside of the square extrusion; is that correct?

(Testimony of Eugene L. Grindle.)

A. Yes, it is. It is tapered slightly so that you get pressure on all surfaces of the extrusion.

Q. Actually what happens when you dip that into the cement the cement flows up into these spaces, the open spaces, and it also dissolves a portion of the extrusion; is that correct?

A. Yes, it does. It softens all the surfaces of the plastic. The purpose of softening it is to permit it to flow, and when you put pressure on it fill the uneven surfaces, and the cement, the solvent itself, is what does the bonding on the surface of the plastic.

Q. Was all this information relative to forming a good bond between one piece of tenite II and another piece of tenite II [302] available in 1948?

A. Yes, it was; it was in our shop manual.

Q. Tenite II refers to cellulose acetate butyrate; is that correct?

A. That is correct.

Q. That is the trade name for it?

A. That is correct.

Q. I hand you a piece of paper that is entitled, "Process standard of the Douglass Aircraft Company." Here is a copy for your Honor. Now what material is listed as a cement on this process standard?

A. This is a process standard for cementing tenite II to tenite II.

Q. Which is what we are doing here; is that correct?

A. That is right.

Q. And what date does this process standard carry?

A. October 9, 1946.

Q. What cement is listed?

(Testimony of Eugene L. Grindle.)

A. This particular sheet calls for butyl acetate, which is also a solvent recommended on that Plastics Identification Chart.

Q. Which is Plaintiff's Exhibit No. 27; is that correct? A. That is correct.

Q. Could you go through briefly the procedure they give for cementing tenite II to tenite II? [303]

A. Yes. I would like to point out that they call for using a felt pad. This specification is to cover applications where you are trying to control the depth that you are dipping the material and also it is designed so that you can end up with a clear cementing joint when you get through. A clear joint in this particular application is not necessary.

Q. Could you just go through the procedure they give?

A. Well, in preparation they say to place a piece of half inch thick felt pad in a metal container having a flat bottom; fill the container with butyl acetate up to half the thickness of the felt pad. Then you place the surfaces to be cemented on the felt pad and press slightly. In pressing it the felt immediately absorbs the solvent so that the pad is saturated and now you are just controlling the amount of solvent that you get on the plastic. Then you allow one surface to remain on the pad from 15 to 30 seconds, and the second surface from 30 to 60 seconds. Then you place the assembly in a fixture to get pressure, and use enough pressure to give it complete surface contact.

Q. Is that what you are doing here?

(Testimony of Eugene L. Grindle.)

A. That is exactly what I have done here. And then clamp for 15 to 30 minutes.

Q. Was this information readily available to anyone in the plastics field?

A. I should think it would be. It was in our standard shop [304] manual at the Pan American, and we weren't necessarily experts in the plastics field—although from some of the testimony we heard here I think we probably do have some pretty well qualified experts.

Q. I note that at the bottom of the page it says——

Mr. Naylor: Your Honor, I move that that last go out as a purely voluntary statement.

The Court: It may go out.

Q. (By Mr. Hohbach): I note at the bottom of the sheet it says that this specification is particularly adapted to pin jack assemblies?

A. Yes.

Q. What is a pin jack assembly?

A. Pin jack assemblies are—it is an adaptor with pins in it primarily for electrical use and ear-phones and headsets and things like that where you are interested in a seal around a pin so that no static or anything will develop in it.

Q. That is very similar to the type of construction that we have here?

A. I would consider it very similar, because you are trying to get a seal and a strength bond at the same time.

(Testimony of Eugene L. Grindle.)

Mr. Hohbach: I will offer this in evidence as Plaintiff's Exhibit next in order.

The Court: It will be received. [305]

The Clerk: Plaintiff's Exhibit 28.

(Whereupon, document referred to above was received in evidence and marked Plaintiff's Exhibit No. 28—Douglass Aircraft specification sheet.)

Q. (By Mr. Hohbach): I hand you another document which is entitled, "Lockheed process specification." What title does that bear, Mr. Grindle?

A. It is a process specification entitled, "Cementing of acrylic base plastics."

Q. Are these plastics different from tenite II?

A. Yes, they are. Acrylic plastic is what is known in the trade as plexiglass or lucite. It is a plastic that is a little more brittle than tenite II and its advantage is that it is very clear. It is what is used in aircraft primarily for windows and in applications where you are interested in clear visibility. It is very similar to glass in its clearness.

Q. Are the cementing procedures used for acrylic base plastics very similar to those used for tenite II?

A. The procedures are practically identical. The type of solvent and things you would use may differ depending on the materials that you are using.

Q. You can find out what solvent to use by re-

(Testimony of Eugene L. Grindle.)

Referring to a chart such as Plaintiff's [306] Exhibit 27?

A. No difficulty in finding the proper solvent.

Q. What date does this document bear?

A. This document is dated January 25, 1945.

Q. And I see it is approved by numerous people.

Does that mean that it apparently had wide distribution?

A. The Lockheed and all the manufacturing—aircraft manufacturers' manuals had distribution through the industry to anyone using their airplanes, as well as the Army and Navy, and any aircraft sold to the Army and Navy and specifications for them had to be approved by the Army and Navy.

Q. What solvent is recommended for acrylic base plastic?

A. Well, they recommend methylene dichloride. It is my understanding that methylene dichloride is a misnomer; that ethylene dichloride is the material—is the actual material. It is a common misnomer to call it methylene.

Q. Would you go through the procedure they give for cementing? I believe it is beginning with paragraph 6.

A. Would you like me to read it?

Q. Well, read it or give a brief resume of what is stated.

A. Well, they state that, "The bonding of acrylate-base plastic is accomplished by the softening and intermingling of the two surfaces. The

(Testimony of Eugene L. Grindle.)

cement attacks the surface layer forming a well-defined soft 'cushion,' which, when the two pieces are pressed together, allows the surfaces to intermingle and form a cohesive bond." [307]

They tell how to do that. In soaking, you immerse the surfaces the required time to get the soft cushion, but they put a note in here; they say: "The purpose of the cushion is merely to permit intimate contact of the surfaces. It is the liquid on the surface that effects the bond."

Q. What does it say about assembly?

A. It says: "Since the liquid which is on the cushion evaporates rapidly, the joint shall be assembled as quickly as possible after soaking. If the interval between soaking and assembly is unavoidably long so that the cushion surface crusts over, it shall be brushed with cement before assembly."

Q. There is one other paragraph I would like to go over; that is, "Cementing small cracks." Will you go over the procedure they give there?

A. Well, they recommend to "cement small, clean cracks which show no shattering may be cemented by spreading the edges slightly apart and injecting methylene chloride by hypodermic needle or other suitable means. The solvent shall be applied so that it penetrates the entire length of the crack. As soon as the edges are softened, apply a slight pressure by means of a suitable jig until a firm bond is attained."

I remember at one time discussing with Mr. Welch the use of a hypodermic needle to get the

(Testimony of Eugene L. Grindle.)

solvent into the area [308] where he was having trouble sealing it.

Q. This is very similar to what you are doing here; is that correct? A. That is correct.

Mr. Hohbach: I offer this in evidence as Plaintiff's next in order.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(Whereupon, Lockheed process specification sheet referred to above was received in evidence and marked Plaintiff's Exhibit No. 29.)

Q. (By Mr. Hohbach): I hand you another document entitled, "Lockheed process specification."

A. This is the same specification, Mr. Hohbach, but I believe it is a revision of the original.

Q. What date does it carry?

A. March 15, 1947.

Q. What cement is listed?

A. They still recommend methylene dichloride.

Q. And then what do they list on paragraph 3.4?

A. I am sorry; the cement they call for is Acrylate Monomer Base spec. AN-C141.

Q. That is the specification that you gave on your drawing, Plaintiff's Exhibit 26?

A. That is correct. That is the specification that was [309] called for in the original drawings given to Mr. Welch.

Q. And apparently this information was taken

(Testimony of Eugene L. Grindle.)

from this sheet of paper, is that correct, and put on that drawing?

A. I wouldn't exactly say it was this sheet of paper, because we had Army and Navy specifications out there and also it could just as well have been that.

Q. But it is the same specification?

A. Same specification.

Q. What does it state if the cement is too thin? What does it tell you to do?

A. It just says if it is too thin to mix some more shavings of the basic plastic until that dissolves and will be thicker; or if it is too thick just put in a little more solvent, until you get the desired consistency.

Q. In what paragraph does it tell you to do that? 4.11—

A. 4.11 says: "If cement becomes too thick, cement may be thinned with methylene chloride."

4.12 says: "If cement is too thin, add clean acrylate-base plastic chips and stir until all chips are completely dissolved."

Q. Then it appears there would be no problem to get a cement of the desired consistency?

A. None at all. It says further here that "the addition of plastic chips does not affect the action of the cement, nor is it sufficient to fill any irregularities in the fit." [310]

Mr. Hohbach: I offer this as plaintiff's next in order.

The Court: Plaintiff's 30.

(Testimony of Eugene L. Grindle.)

The Clerk: Plaintiff's Exhibit No. 30 in evidence.

(Whereupon, Lockheed process specification was received in evidence and marked Plaintiff's Exhibit No. 30.)

Q. (By Mr. Hohbach): Now, would you make some cement from your plastic chips and your ethylene dichloride that you have in the two bottles?

A. It will take some time for this to dissolve.

Q. You aren't ready to seal the ends?

A. Let's wait until after we seal the other end because I don't want to get these two ready before called for.

Q. Are you just using ethylene dichloride or are you using cement?

A. After the end is sealed I will just fill it in with cement to be sure it is sealed.

Q. You don't want to make the cement?

A. I can make some now. It is just a question of pouring the solvent in that.

Q. Will you explain what you are doing at this time?

A. I am just pouring some ethylene dichloride into these shavings of cellulose acetate butyrate.

Q. How long will it take to make that?

A. Well, it depends on how fine the shavings are, but this possibly might take a half an hour or so with what we have [311] there, but you can take solid plastic and it will dissolve, but it takes a little longer.

(Testimony of Eugene L. Grindle.)

Q. When does the time run out on this end? When do you want to seal the next end?

A. Oh, about fifteen minutes yet. You can't leave it in there too long, but you can take it out too soon.

Mr. Hohbach: Your Honor, I have just about concluded my redirect. I was wondering if some time later in the date we could interrupt the testimony of some other individual and seal the other end for you?

The Court: All right.

The Witness: One thing—pardon me. One thing I would like to review here is that I have an end plug that was cut off a stick that was made in this manner; and we discussed earlier, one of the objects of this end plug was to give you a good strength bond to take the stresses that might be placed on it when it was thrown to the floor. I would just like to submit that so you could examine how good a bond this particular method will produce.

Q. (By Mr. Hohbach): Is that a solid end plug or is that a laminated plug?

A. That is a solid end plug.

The Court: Am I using this glass correctly?

A. Put it right in your eye, your Honor; then you will have to focus it. [312]

The Court: I mean, I am looking in the right end?

A. You are looking at the right end; you might have to get it a couple of inches from your eyes.

(Testimony of Eugene L. Grindle.)

Mr. Hohbach: You actually sawed this off the end of this particular dipstick?

A. That is correct; it was actually sawed off the end of this one. I had a limited supply of extrusions so I cut one off—cut it off of this particular one and shortened it up. And then I have samples of the two different plugs that we are talking about here.

Q. You just have those extras in case you lost one?

A. Those are the ones that I made up to get the size and I use them for a die to make my dies for producing in quantities.

Q. How did you make the end plugs? I mean this end plug.

A. That is just made by taking a thick plastic—this particular one is made out of lucite, and I cut it square first to fit inside of the extrusion and then cut the end—the holes in there to accommodate the round tube.

Q. You actually machined these end plugs?

A. These were made by hand just to get the size that we wanted and then a die was made up from this.

Q. And this is a 1/16th inch piece, is that correct?

A. This is 1/16th inch material, and these we made a die for stamping these out of sixteenth inch sheets.

Q. The 1/16th one is stamped and the other one is machined; [313] is that correct?

(Testimony of Eugene L. Grindle.)

A. That is correct.

Mr. Hohbach: I would like to offer these in evidence.

The Court: They will be received.

The Clerk: Plaintiff's Exhibit 31 in evidence.

Mr. Hohbach: I think we ought to identify them separately. I will try and identify them separately.

The Court: May I suggest we take a recess for a few minutes?

(Recess.)

Mr. Hohbach: Your Honor, I would like to offer these in evidence at this time, as I think it is Plaintiff's Exhibits 31-A, B and C. 31-A is the sawed off portion of the dipstick; 31-B is the 3/16ths plugs, and 31-C is the 1/16th inch plug.

(Whereupon, dipstick and plugs were received in evidence and marked, respectively, Plaintiff's Exhibits Nos. 31-A, B and C.)

The Court: Do you have a container for them?

Mr. Hohbach: Yes, we do, your Honor.

Q. Mr. Grindle, would you like to seal the other end of the dipstick at this time?

A. Yes. This has been in the mold long enough now.

Q. What is that wooden plug in your die? It isn't a die, really? [314]

A. No, this is just a simple die made for this demonstration. I had to make a wooden plug in there so that at one end I could accommodate the

(Testimony of Eugene L. Grindle.)

small tubing that is sticking out, just a support when I press it in there.

Now, that end is solid, as far as the strength bond is concerned. This will be shaved off here; this is excess material.

Before going any further now, I would inspect that to make sure that I had a good bond before I went any further. Actually there are little tricks in the production assembly of the stick, but I don't see any need to reveal them here—that would guarantee a good seal every time. I will go ahead with the other end now.

Q. Before you go into that, is this the laminated end or the plug end?

A. This is the solid plug end.

Q. Does that fit rather loosely in the square extrusion?

A. Yes, it does, the same as the other end did. Actually the most difficult point to seal in here is that in the corner behind this round tubing, because the two corners are not the same diameter. You can see a very large gap in this corner here; that is really the only tricky part about the sealing. That is what the die does; the die presses those corners so you could get them into contact.

Q. Is the plug that you have here generally the same [315] dimension as the cross-sectional dimension of the filler?

A. Yes, it is. Actually the filler—the wooden filler has a thick paper cemented around it, but I

(Testimony of Eugene L. Grindle.)

would say that the end plug is about the same size as the finished filler in there.

Q. Is that the way it is called for in the drawing, Plaintiff's Exhibit No. 26? A. Yes, it is.

Q. Will you go ahead with the demonstration?

A. I will again just repeat this.

Q. You dipped it down until it comes up to the filler, is that correct?

A. Just so you get the solvent in far enough to get all the surfaces of the filler wet.

Q. In your opinion, this is a relatively simple cementing procedure, is that correct?

A. I would consider this simple. Compared to some cementing applications that have to be done with plastics, this is extremely simple.

Now, I have to get these (indicating). What we would do with this—let me set this down here on the floor.

Q. Do you want to put it together, because we want to introduce it in evidence? Can you stick it in here?

A. What I wanted to do now is get it down and show the final patches. Just to make sure you get a good seal, I [316] would like to put some cement around the end on this solvent, and then that end is finished, as far as sealing is concerned. May I do that?

The Court: Yes.

Q. (By Mr. Hohbach): Will you explain what you are doing in detail?

A. This is just using now some of the cement.

(Testimony of Eugene L. Grindle.)

Q. Before you were dipping the stick in ethylene dichloride?

A. Just in solvent. Now, perhaps if you wanted an extremely loose fitting plug in this end—and I don't see any particular need for that—you could dip it into a cement like this rather than a solvent, so that it would fill the irregularities up.

Q. You are using a paint brush, are you?

A. I am just using a paint brush.

Q. Going around the edges of the square extrusion; is that it?

A. That's right. As I said before, now, in actual practice before I did this step, it would be inspected with a magnifying glass to make sure there weren't any cavities in there that were not filled. If there were a cavity in there, that was not filled, and even though it was not through to the surface, you would just drill a tiny hole into the cavity and inject some solvent or cement in it to seal [317] it up.

Q. How would you inject the solvent or cement?

A. With a hypodermic needle. If you were using solvent, it would run down there by itself.

Q. You have done about all you can do at this time, is that correct?

A. Just so the stuff doesn't crystallize. I am getting nervous up here.

Q. You mean when it crystallizes, it will become brittle; is that correct?

(Testimony of Eugene L. Grindle.)

A. No, it may flake a little bit. If the stuff dries too fast, it may flake a little bit.

Q. When do you want to make up this bottle of cement?

A. That cement just takes time to dissolve, that's all. It is made right now. It is starting to dissolve already.

Q. How long does it normally take?

A. It depends on how fine shavings you have. A couple of hours would probably dissolve this type of shavings. This is cement here that was made exactly that way.

Now, the other end—if you want to knock off this demonstration—the other end, when it came out of there, I would just do the same thing to it, then it is finished. I would clean this off and paint the end. Actually this will look very nice when it is through. There isn't very much need to paint it.

Q. I hand you Plaintiff's Exhibit 5. You remember you [318] testified about this?

A. Yes, this is the original sample of dipstick incorporating the scale inside of the fluid columns.

Q. This is an example of the first sample, is that correct? A. Yes.

Q. Is that a difficult job of cementing these laminated sheets together?

A. This is what I would consider an extremely difficult job of cementing plastics. You can see here, your Honor—if you recall, this is made up of a whole series of little tiny strips and every strip has to be sealed on all surfaces throughout the length

(Testimony of Eugene L. Grindle.)

of that tube because you are taking fluid up in there. If there was an air leak or a fluid leak, it wouldn't hold there, and that is an extremely difficult job of cementing plastics. You could never make a thing like that in production.

Q. You sent this stick to see whether or not it would work? A. Yes, we do.

Q. Each column held fluid, is that correct?

A. The same as we did with the original one that we made.

Mr. Hohbach: I would like to offer this in evidence, your Honor, this sample dipstick which has just been completed.

The Court: Any objection?

Mr. Naylor: No objection, your Honor.

The Court: Let it be received. [319]

The Clerk: Plaintiff's Exhibit 32 in evidence.

(Whereupon, sample dipstick was received in evidence and marked Plaintiff's Exhibit No. 32.)

The Witness: I haven't finished the other end. I could cement it first, if you like.

Mr. Hohbach: Shall we complete the dipstick, or what do you think would be most advisable? We could complete the other end about a half an hour from now. We could interrupt another witness.

The Court: It is immaterial to me.

The Witness: The only thing, if your Honor would care tomorrow some time—it should cure for

(Testimony of Eugene L. Grindle.)

about 12 to 24 hours—to test it to destruction, just to see that it has got a good seal. Then I would complete the other end here.

Mr. Hohbach: I will offer this in evidence as the plaintiff's next in order. The sample dipstick, we will make that 32-A, and then we will make the block with the three bottles 32-B.

The Witness: I would like to say that on one of my visits to Mr. Welch's shop, in his outlining the difficulty he was having in sealing this stick and what prompted me to suggest that he use the hypodermic needle, was that he used to stick an ice pick inside of the little round tubing and distort the tubing away from the wall and take a toothpick and get cement down in that corner, which is the [320] place he was really having difficulty with sealing, and then relieve the ice pick pressure and let the cement squeeze up around that tubing. A very simple mold would have solved that problem very simply.

Mr. Hohbach: Your Honor, I believe that completes the redirect.

I would like to move at this time to amend our complaint to conform to the evidence in accordance with Rule 15(b) of the Federal Rules of Civil Procedure, and in particular we have in mind the evidence relating to Mr. Grindle's immediate intent to manufacture and sell, his making tools and dies in preparation to manufacture and sell, his obtaining money for the corporation to go ahead and manufacture and sell dipsticks, and the fact that he didn't discover the fraud until September 28th of

(Testimony of Eugene L. Grindle.)

1953, and that since that time he has been diligently pursuing his rights against Mr. Welch.

The Court: Do you have any objection to that amendment, Mr. Naylor?

Mr. Naylor: I would like a little better specification as to just where this amendment is to occur, and what it will consist of, and I would like to be heard at that time, your Honor.

The Court: Do you contemplate filing an amendment?

Mr. Hohbach: We do not, your Honor.

The Court: I think that would be more satisfactory. [321] Instead of amending it on its face, I think you should file an amended complaint to incorporate this evidence, and then Mr. Naylor will have an opportunity to take appropriate action as he deems necessary.

Mr. Hohbach: I haven't gone to the trouble at this time of preparing an amendment. Did you mean that we should file it during the proceeding of this action?

The Court: I think so. Could you do that conveniently?

Mr. Hohbach: I can try and do that this evening and have it tomorrow, if possible.

Mr. Naylor: I don't think the amendments are of a nature that would permit us to amend on the face of the complaint.

The Court: That is why I suggested it—that he file an amended complaint.

Mr. Hohbach: We will rest, then, your Honor.

(Testimony of Eugene L. Grindle.)

The Court: All right.

Mr. Naylor: May I have the last statement that counsel made?

(Last statement of counsel read.)

Mr. Naylor: "We will rest." Thank you.

The Court: This examination that you are now about to conduct is without any prejudice to any motion that you may care to make subsequently?

Mr. Naylor: It is, your Honor. Yes, your [322] Honor.

Recross-Examination

By Mr. Naylor:

Q. I just have a few questions, Mr. Grindle. You mentioned that you made a suggestion to Mr. Welch while you were in his workshop concerning the end sealing of the dipsticks. Could you fix the time for that?

A. That was some time after he had made his initial delivery—that is, partial delivery on our first order. I had not been in Mr. Welch's home or shop prior to the date that he delivered the first portion of our initial order. That was—I believe he delivered 54 of the first 100. Prior to that time I have not been in Mr. Welch's shop, so it was some time after that.

Q. After the first delivery? A. Right.

Q. Now, this demonstration that you arranged in court this morning, what was the inspiration for that, Mr. Grindle?

(Testimony of Eugene L. Grindle.)

A. Well, Mr. Naylor, the last day in court here there was a gentleman as a witness who testified to the effect that sealing——

Q. You are speaking of Mr. Rollins, aren't you?

A. Mr. Rollins, yes. That the job of sealing the end of this stick was a very difficult application. However, he confined his remarks mostly to a job of sealing it with a cement or a goop, as he called it. Why Mr. Welch and he were pursuing the application of goop to the end of this [323] stick rather than plugs in the end, I don't know, because, as we all see, Mr. Welch ended up after all this work going back to plugs in the end. Mr. Rollins did make some reference to the plug in the end where he also outlined that because of the wide tolerances that have to be dealt with in this extrusion, that a plug would not be practical because you would have to have this infinite variety of sizes of plugs. So the purpose of that demonstration is to show that the tolerances in the extrusion are not a problem if you make proper tooling for it, and, as you see, very simple tooling, so that one standard plug would satisfy the widest range in tolerances that you would get in the extrusion.

Q. May I interrupt you? Who did you talk with in arranging this demonstration beyond Mr. Hohbach and Mr. Swain?

A. On my way home that night I decided to—I thought about this driving back to the Peninsula, and that very evening I called this man that does

(Testimony of Eugene L. Grindle.)

all my production work, Mr. Savage, and told him what I wanted to do, and just outlined it on the telephone, and the next day he had this kit all ready for me.

Q. Mr. Savage prepared this kit?

A. Mr. Savage did, yes.

Q. The demonstration that you have put on, is that intended to be a representation by you—to a satisfactory commercial production? [324]

A. I only built this for a very simple demonstration. I didn't see any need to reveal my production techniques. They would be more positive, faster, better control——

Q. You do regard that as confidential information, do you not, your production methods?

A. Yes. I considered that I might risk revealing this portion of the application in court, but production tooling is something that has nothing to do with the patent question involved here.

Q. This, then, is just a simple demonstration by you as to what you believe is the simplicity of sealing the ends, is that right?

A. Yes, as far as—if that were the only thing available, you could produce a production dipstick in just this manner very cheaply and simply. I believe I have demonstrated that.

Q. That is your opinion? A. Yes, it is.

Q. You have not had any opportunity to test the permanency of the end seal which you have demonstrated?

A. Yes, we have, Mr. Naylor.

(Testimony of Eugene L. Grindle.)

Q. Which you demonstrated to His Honor this morning, have you? A. Yes, we have.

Q. When?

A. I started following our last day in court here and we [325] built up several of them like this and tested them and are very satisfied that we had a good job.

Q. You mean between the last session of court and this session you tested the permanency of this end seal? A. Absolutely.

Q. What does permanent mean to you?

A. With the information available to me in plastics, Mr. Naylor, using the solvents recommended and the plastics that we are dealing with here, you don't have to wait for two years to determine the permanency because with this application—and it is well known in the industry—you are not using any foreign materials; you are just getting a cohesive bond of basic materials—it is well known that they are a very permanent and satisfactory seal.

Q. Have you ever heard the word "craze" as applied to a bond of that nature?

A. I believe anyone in the aircraft industry is probably familiar with the word "crazing," for years back.

Q. What does the word "craze" mean to you—as applied to plastics that have been bonded together?

A. Why, there are certain what appear like cracks to the eye, internal separation of things in

(Testimony of Eugene L. Grindle.)

plastics which look like it has been chipped or cracked.

Q. I assume that you have——

A. That is, by the way, not much of a problem with Tenite. [326] Tenite is a much better plastic for that particular problem than acrylate plastics are.

Q. When did you collect the data sheets, Plaintiff's Exhibits 27, 28, 29 and 30?

A. When did I collect them?

Q. Yes. A. Originally?

Q. No, I mean for the purpose of producing them here.

A. The Friday following the last day we were in court here. Actually I had them—one of them in my own personal file and all the others were very accessible to me, and I could have brought numerous additional documents which I didn't think were necessary.

Q. Now, I assume that you have on file at Pan Am the government specification on AN-C-141, have you?

A. We did have. That has been obsoleted for several years now.

Q. You say you did have? A. Yes.

Q. Was the copy destroyed?

A. Yes, we always destroy it when it is superseded by a later revision.

Q. Do you have anything on file at Pan Am to show what you meant by AN-C-141?

(Testimony of Eugene L. Grindle.)

A. I have the latest military specification on the same [327] procedure.

Q. I am speaking of the specification as of 1948 when you made Plaintiff's Exhibit 8.

A. Do we have anything on file?

Q. Yes.

A. No, the actual specification, as I stated, we would delete that as soon as the revision would come out because we would immediately start using the latest revision.

Q. So the answer simply is that you don't have the 1948 specifications?

A. No, but I can get one. There is no problem getting one if you want it.

Q. Can you get one? A. Surely.

Q. Will you do so?

A. It will take some time. We have to go back to the government file. I will tell you, if you want to know what it says. It is quite well covered in that Lockheed process specification because it is practically the same thing.

Q. Practically the same thing?

A. Yes, it covers the application of the cement. The actual specification AN-C-141 is a specification for making the cement itself and it refers to another Army and Navy document for the use of the cement.

Mr. Naylor: I think that is all, your [328] Honor.

The Court: Anything further?

Mr. Hohbach: We rest, your Honor.

The Court: You may step down.

Mr. Naylor: Your Honor, before opening the defendant's case, I must state that I have two desires in the further handling of this matter.

First, my impulse is to move for a dismissal of this action on the multiple number of grounds, at least two of which have already been brought to your Honor's attention at the time of the interlocutory stage of the case. That was the motion to dismiss for lack of jurisdiction and the motion to dismiss because the action was obviously barred by the statute of limitations, the applicable California statute.

The other impulse is not to interrupt the hearing in this case, but to proceed with the showing of the defendant's evidence and let the matter go to a final hearing so that it is not held up and the final action of the case is not delayed.

I think it would be well and fitting under those circumstances if we proceeded with the making of these motions of which I speak, as briefly as I can possibly present them to your Honor.

Now, looking back at the time our motion was presented in May of 1955, your Honor will recall that there was a motion for dismissal of the complaints for lack of jurisdiction. We [329] urged at that time that the question of title to the letters patent is not an action arising under the patent laws, but rather a patent right question based upon common law or equity which, in the absence of diversity, is within the jurisdiction of the state courts.

And if the complaint here is looked at in proper

focus, I think it will be seen as one that is based upon two theories: number one, there is the theory that Mr. Grindle was the inventor of the subject matter of the letters patent in suit, and hence should be adjudged the owner of the patent.

The second ground of the action, or second basis of the action is that Mr. Grindle is about to embark upon the manufacture of the subject matter of the letters patent in suit and has been threatened, as he says, with an action in the event that he does so.

As to the first theory of the action, as we have said, this is not an action that arises under the patent laws. Both of these gentlemen are residents and citizens of this state and hence we have no diversity.

The authorities that we presented at the time of the presentation of the motion in its original form go quite far in laying down the rule that should be applied by the federal courts in determining matters of jurisdiction where a controversy of that type is before the Court: first, an [330] absence of diversity, and, secondly, a controversy affecting title to the letters patent in suit. And the last case that we called the Court's attention to was the case of *H. J. Heinz Company v. Superior Court* at 42 Cal. 2d. 164, and especially at page 172. That was a case decided January 29, 1954, and in that case the Court observed:

"It will be noted that the statute 28 U.S.C.A. 1338(a) *supra*, states that the Federal District Court has exclusive jurisdiction of actions arising under federal patent law. It does not purport to cover all

patent right questions which may arise in some other kind of an action or case such as one based on common law or equity. The latter actions manifestly are within the jurisdiction of the state courts. As said in Section 711, the predecessor of 28 U.S.C.A. 1338(a) *supra*, does not deprive the state courts of the power to determine questions arising under the patent laws but only on assuming jurisdiction of cases arising under the patent laws.”

So we think that the complaint, insofar as it presents or seeks to present, a claim of title or ownership of the subject matter letters patent in suit, this controversy would be justiciable under the state law.

There has been added to this, as we shall demonstrate, a further reason why this is no longer a controversy at all [331] concerning anything that Mr. Grindle claims he invented.

We have stated in our opening statement and we shall demonstrate before this Court this further angle: If the record here be read to date, it will be seen that Mr. Grindle does not assert that he was the inventor of the subject matter of Claims 2 and 3 of the Welch patent in suit. He does not profess that he made the development which is spelled out in those two claims. At best, he asserts that he was the inventor of the subject matter of Claim 1. But that Claim now stands disclaimed. If Mr. Grindle ever had a claim—which we emphatically deny and resist—to the subject matter of Claim 1, Mr. Grindle under the statute and the interpreting authorities

is bound as a subsequent owner by any disclaimer that is filed in relation to the patent as to any claim. Therefore, Mr. Grindle stands before this court as bound by the disclaimer which has been entered in this patent in inconsistency with that section of the answer to the complaint which admits invalidity of the subject matter of Claim 1. So the net effect of that is this: Here we see Mr. Grindle before this court with a claim of ownership of the subject patent, there being no diversity of citizenship, and yet his claim, admittedly, by his own admission, ran only to the subject matter of Claim 1, and the case taking on the complexion of a disclaimer as to the subject matter of Claim 1, thus any last vestige or semblance [332] or jurisdictional foundation has been pulled out from under Mr. Grindle and the action should be dismissed for that further reason, or amplification of the original reason, if you will, as to why this Court should not entertain jurisdiction as to the title question.

The second aspect of the motion to dismiss related to the question of whether there was a justiciable controversy within the meaning of the Declaratory Judgment Act.

I will not take the Court's time to review in detail the various detailed attempts by the plaintiff in the action thus far to put himself in the position of one who can assert the benefits or claimed benefits of the Declaratory Judgment statute with respect to actions seeking the validity of patent claims; but the best you can add that up to, as we see it on the present collection of the record, is that he has a de-

sire to embark upon a business manufacturing dipsticks. It is a desire, however, which is on all sides watered down and qualified, as, for example, you will find the statement here that he does not want to get started because Mr. Welch has a patent number on his device. And the inference you draw from that is that he thinks it wouldn't be worth his while so long as Mr. Welch has a patent. Elsewhere he adds up such facts as he has aroused the interest of capital. But when you look at that, you will find that capital has put a "go slow" rein on the project, saying, "Clear [333] the atmosphere or do something else." But in no sense can you spell out the type of business established as is called for by even the cases that go even the furthest.

Now, I am well aware of the fact that there is one Ninth Circuit case decided by Judge Denman where it was said that if a substantial investment had been made in getting set to embark upon the manufacture of the structure in question, such as setting up a plant, or I think in that case they bought some very substantial quantities of pipe—and that case is discussed in the memorandum; I don't need to review it here. But even that case looks for something more than a simple bit of wishful thinking upon the part of the person who asserts the Declaratory Judgment statute. And so there is that second ground that we urge for dismissal of the complaint.

Now, the third—or rather, a second motion, that we would like to bring to your Honor's attention at this time, is dismissal because the action is barred by the applicable statute of limitations which we

understand and apprehend to be California Code of Civil Procedure Section 338, Subdivisions 3 and 4, which, as your Honor may recall, read very briefly as follows:

“3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

“4. An action for relief on the ground of fraud or [334] mistake, because action in such case will not be deemed to have accrued until discovery by the aggrieved party on the facts constituting the fraud or mistake.”

In this situation we have to deal first with the June 10th release by Pan Am in which this individual plaintiff participated. Mr. Grindle authored that release. His initials appear on the communication as the dictator or author. He then procured the signature of his superior who was qualified to bind Pan American.

It will be noted that the release to Mr. Welch to proceed with the device in the concluding paragraph is clear and without any words of equivocation; it authorizes him to proceed and do what he will with it commercially. It seems to us that those words mean just what they said. Insofar as Pan American certainly is concerned, it was the go-ahead signal to Mr. Welch to proceed. And we think it bears the further interpretation that insofar as Mr. Grindle participated in the draftsmanship of it and did not see fit to simultaneously express by word or action or deed some reservation of any personal interest that he may have understood or thought he

had in the subject device or the subject development, then I think the Court should properly construe the June 10th, 1948, communication as a joint release, in that Mr. Grindle, by failing to declare an exceptional reservation, is deemed to have waived his rights as of that date and [335] chucked whatever interest he had into the common pot covered by the Pan American release of June 10, 1948, and he should certainly not be heard at this late date to assert some different theory.

Now, we are not standing or resting on the June 10, 1948, release alone, for the simple reason that the conduct of the parties show a development of a very substantial and detail commercial picture, and all of it stems back to the June 10, 1948, release.

In the first place, in the very first delivery of dipsticks produced by Mr. Welch, his name was put upon them as the manufacturer. Now, that brought home to Pan American, and most certainly brought home to Mr. Grindle, that here was a change in Mr. Welch's position, a change that had been induced by the very import and wording of the June 10, 1948, release, because he had embarked then upon a business of doing precisely what the release recognized would be done. And this, followed through with the manufacture by Mr. Welch, and the sale of devices to not only Pan Am, but to other airlines and to the United States Government.

Now, we state further that in that connection Mr. Grindle, having participated in the June 10, 1948, release, and at the same time having failed to assert

any personal reservation or exception from that release, Mr. Grindle is now estopped to contend that at this late date that he has [336] any interest in the subject matter affected by the release or covered by it.

In support of this second aspect of the motion, we would like also to urge that the June 10, 1948, communication from Pan Am (so far as Mr. Grindle participated in it) releasing the design of the dipsticks to the defendant to market as he saw fit, that thereby Mr. Welch was duly licensed to make and sell the dipsticks and has acted pursuant to that license in the manufacture and sale of the same.

Now, as to the staleness of the claim. It is our position, your Honor, that Mr. Grindle had knowledge from at least as early as June 10, 1948, and continuing down to date, or he had chargeability of knowledge, that at all times Mr. Welch was consistently and continuously manufacturing and selling these devices with Mr. Welch's name affixed thereto as the manufacturer.

And for those reasons we think it would be unconscionable at this late date to regard the Grindle claim as anything other than a stale claim.

Further, we urge your Honor to bear in mind that despite Mr. Grindle's personal feeling about this matter of price, which he says he negotiated with Mr. Welch, but which he now concedes was not relied upon by Pan American in the same sense in which he believes it may have been relied on by virtue of the fact that Pan American approved the [337]

various price increases that were frankly and forthrightly noticed to them. Hence, the June 10th, 1948, release from Pan American has never been rescinded or vacated or cancelled and stands without any qualification insofar as Mr. Welch is concerned.

A final word on this matter whether the plaintiff is before the Court properly on the so-called Declaratory Judgment aspect of the matter. As we asserted in the answer, and I think it is certainly true here, the plaintiff has merely gone through the motions with respect to manufacture and sale of said articles in an abortive attempt to create an actual controversy cognizable by this Court under the Declaratory Judgment Act, and that therefore this action is a sham action and should be dismissed. I think that presents the two motions that we have, your Honor. First, it is representation of the motion to dismiss for lack of jurisdiction as to the claim of ownership now amply demonstrated on this record, and, number two, the lack of a cause of action cognizable under the Declaratory Judgment Act, and, thirdly, the motion to dismiss upon the multiple grounds that we have presented, namely, the staleness of the claim, the effective release from Pan American participated in by the plaintiff, and all of those add up to the proposed proposition that the action should be terminated at this stage of the case. [338]

* * *

No. 15540

United States
Court of Appeals
for the Ninth Circuit

C. MARTIN WELCH,

Appellant.

vs.

EUGENE L. GRINDLE,

Appellee.

Transcript of Record
(In Three Volumes)

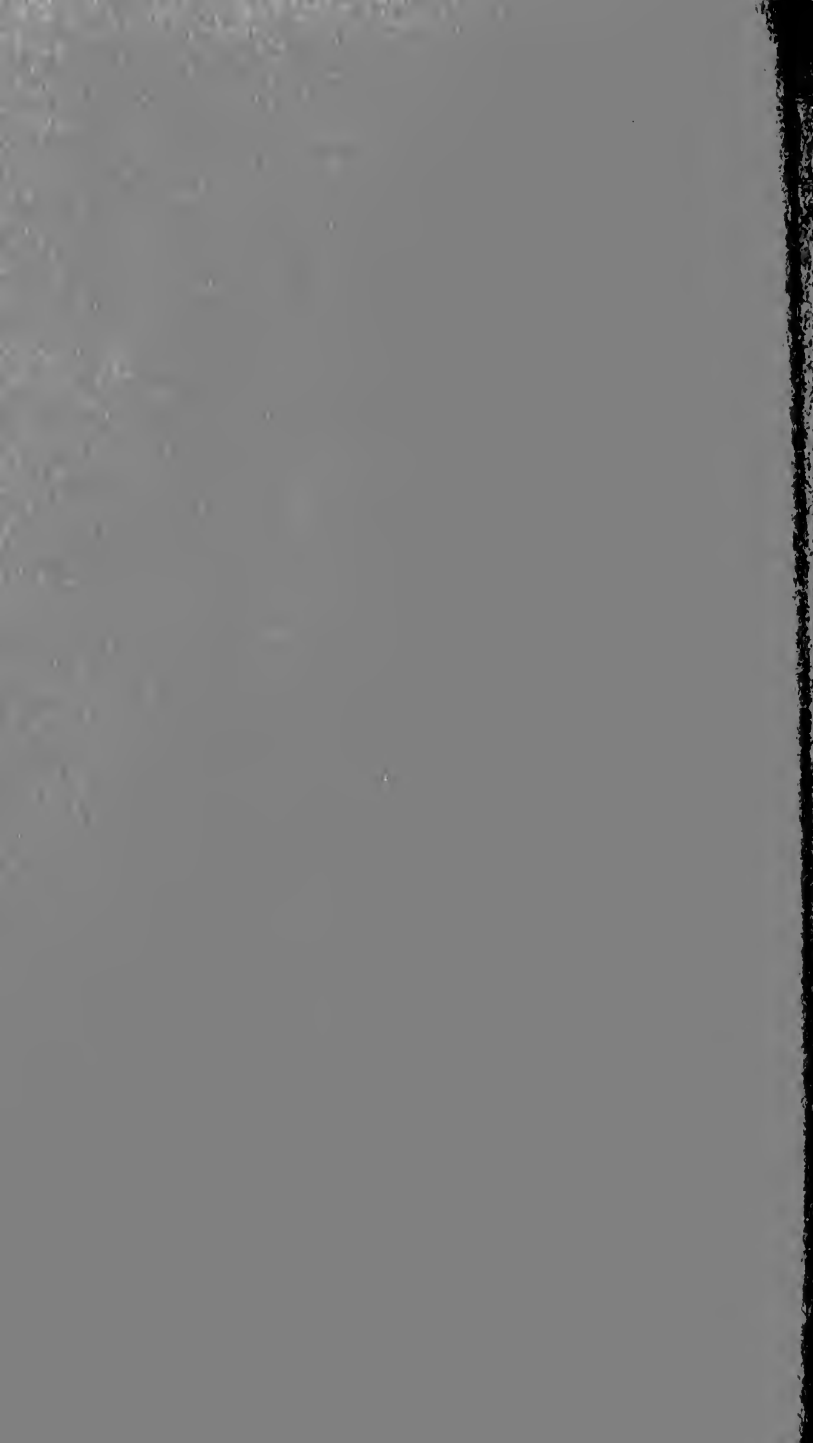
Volume II
(Pages 365 to 716)

Appeal from the United States District Court for the
Northern District of California.
Southern Division.

FILED

JUL 18 1957

PAUL P. O'BRIEN, C.



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Volume II
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Appeal from the United States District Court for the
Northern District of California.
Southern Division.

Morning Session, Tuesday, Feb. 28, 1956

The Clerk: Eugene Grindle versus C. Martin Welch, further trial.

Mr. Hohbach: Your Honor will remember that yesterday we moved to amend the complaint to conform to the evidence in accordance with Rule 15(b) of the Federal Rules of Civil Procedure. We have prepared such a motion and complaint together with a short memorandum of points and authorities and I would offer you the original copy at this time.

The Court: Do you have a copy of this, Mr. Naylor?

Mr. Naylor: Yes, I have been served with a copy. I haven't had a chance to examine it, however. I would like to see exactly the extent to which it goes before stating a desire to object or making any comment.

Mr. Hohbach: I have a few comments to make.

Mr. Naylor: I am not disposed to object to such an amendment but I would like an opportunity to check it. however.

The Court: Very well. [349]

* * *

Mr. Naylor: Yes. And you are offering a formal motion to amend at this moment?

Mr. Hohbach: That is right; I would like to again make the motion to amend our complaint to conform to the evidence in accordance with Rule 15(b).

The Court: I will take the motion to amend the

complaint under advisement until such time as Mr. Naylor has a chance to object.

Mr. Hohbach: And I also wish to point out that the amendments which we have made in paragraphs 5 and 8 are supported by the evidence which has been presented so far in this case. [350]

* * *

Mr. Naylor: Is it your Honor's disposition that we put our witness, Mr. Kerr, on at this time?

The Court: Yes, if you are prepared to go forward now.

Mr. Naylor: This of course is without prejudice to the motions we have made?

The Court: Yes.

Mr. Naylor: Mr. Kerr.

THEODORE W. KERR

called as a witness on behalf of the defendant; sworn.

The Clerk: Please state your name and occupation for the record.

A. Theodore Wallace Kerr. I am a partner in Kerr Industries, self-employed.

Direct Examination

By Mr. Naylor:

Q. You say you are a partner in Kerr Industries, Mr. Kerr? A. That is right, sir. [351]

Q. Where is Kerr Industries located?

A. 105 Spazier Avenue, Burbank, California.

Q. With what is Kerr Industries concerned? What is the nature of that business?

(Testimony of Theodore W. Kerr.)

A. Well, it is exclusively a custom extrusion—plastic custom extrusion business.

Q. And how long have you been connected with Kerr Industries? A. Almost four years.

Q. What did you do prior to that time?

A. Prior to that I was vice-president of Plastic Process Company.

Q. And they were located where?

A. They are located in Los Angeles.

Q. And for what period of time were you connected with Plastic Process Company?

A. Approximately eight years.

Q. Could you state the period of that connection in terms of years—year dates?

A. Well, the full time year dates were from 1944 until 1952.

Q. Would you please tell the Court something about the nature of the business of Plastic Process Company?

A. Well, the business was one of custom extruding plastic rods, tubes, sheets, monofilaments and various types of decorative molding.

Q. And was that true of the business throughout the period [352] of your connection with it?

A. Yes, that is true.

Q. Are you acquainted with Mr. C. Martin Welch? A. Yes, I am.

Q. How long have you known Mr. Welch?

A. Approximately ten years.

Q. And that would be commencing in 1946, would it? A. I think it goes back to '45.

(Testimony of Theodore W. Kerr.)

Q. Did Mr. Welch have any connection or relations with Plastic Process Company during the period of your connection with it?

A. Yes, he was the San Francisco representative of Plastic Process Company.

Q. Will you tell us something about the nature of his position as a representative?

A. Well, his position was one of securing business in the San Francisco area for Plastic Process Company of Los Angeles.

Q. Was he a salaried employee of Plastic Process Company or did he have some other arrangement?

A. He was not a salaried employee.

Q. He was not a salaried employee?

A. That's right.

Q. Do you recall having anything to do with a plastic dispstick? A. Yes, I do. [353]

Q. When did you first have any contact with a plastic dipstick?

A. Well, my recollection is in 1948.

Q. In 1948. Will you state the approximate time when that occurred?

A. I could only say early in the year.

Q. Early in the year 1948. Do you recall how you first had any contact at all with the matter of a plastic dipstick?

A. Well, of course my recollection was that Mr. Welch ran onto an item that had possibilities as a plastic extrusion.

Q. And how did you learn of that, Mr. Kerr?

(Testimony of Theodore W. Kerr.)

A. As I recall, it was through a letter sent to me by Mr. Welch.

Q. I will show you what purports to be a copy of a communication dated May 3, 1948, and will ask you to examine that and identify it if you can.

A. Well, this is the letter.

Q. Is that the letter? A. That's right.

Q. I would like to ask you in that connection something about your mode of communicating with Mr. Welch during the period that he was San Francisco representative for Plastic Process Company. What kind of stationery was used?

A. Regular company stationery.

Q. And did it correspond to this sheet of paper that I have [354] handed you dated May 3, 1948, in appearance?

A. Well, that was quite commonplace, this type that he has sent down here. We have many copies on file of a similar nature.

Q. And what about your correspondence, if any, with Mr. Welch? How would that appear in relation to this particular sheet?

A. Well, that would appear on a regular form of stationery with a Plastic Process Company heading on it.

Q. I see. Now do you recall receiving a letter such as the May 3, 1948, communication from Mr. Welch? A. Very definitely, yes.

Q. Do you have the original in your personal possession? A. No, I don't.

Q. I would like to ask you to examine this May

(Testimony of Theodore W. Kerr.)

3, 1948, communication and point out to the Court wherein there is any reference in it, if there is, to a plastic dipstick problem.

A. Well, the whole letter refers to a plastic dipstick problem. Well, first off it described a stick and a sketch has been made in the letter of a proposed design and a quantity has been suggested here for both an initial order and a possibility of more being used in the future. And of course it explains quite clearly the reason for the dipstick being such as it is.

Q. I would like to ask you if this particular communication [355] or the original of it was addressed to you or someone else in Plastic Process Company.

A. Well, it was actually addressed to the vice-president in charge of sales because the—well, I would say his responsibility was sales and Mr. Martin's responsibility was likewise sales, so their two contacts naturally overlap.

Q. Is that person identified in the communication? A. Yes, he is.

Q. And his name? A. Harry Wenk.

Q. What were your duties in Plastic Process Company in relation to Mr. Wenk's duties as you have described them?

A. Well, my duties were of course to take the problems that were presented to Mr. Wenk and transmit those into production for decisions against producing them.

Q. Now you state there is a reference in this

(Testimony of Theodore W. Kerr.)

communication—which I think, incidentally, your Honor, I might identify at this time so there will be some continuity in the record. May that be received as defendant's next in order, please?

The Court: So ordered.

The Clerk: Defendant's Exhibit E.

(Whereupon, letter of May 3, 1948, referred to above, was received in evidence and marked Defendant's Exhibit E.)

Q. (By Mr. Naylor): Mr. Kerr, will you examine Defendant's [356] Exhibit E and point out wherein there is any reference to a sketch such as you mentioned.

A. "An alternate design which may work o.k. and save materials such as—would perhaps be better."

Q. That occurs in the middle of the letter?

A. That's right.

Mr. Naylor: I have an extra copy in case your Honor wishes to follow it.

The Court: Thank you.

Q. (By Mr. Naylor): In connection with the statement that you have just read about an alternate design, was there an actual sketch made in the body of the letter?

A. Yes, there is.

Q. And does it appear on that copy?

A. Yes, there is.

Q. Now elsewhere in the communication, Defendant's Exhibit E, will you state whether or not there

(Testimony of Theodore W. Kerr.)

is any reference to a drawing accompanying that communication?

A. Somehow or another I have lost the continuity of this in your last question.

Q. Well, will you start at the beginning of the letter and read straight through? A. Oh, yes.

Q. And see if there is any reference to a drawing? A. That is in the first sentence. [357]

Q. What does it say, Mr. Kerr?

A. "The enclosed drawing is a section of a fuel measuring stick, sample of which is being mailed you today by Pan American."

Q. In connection with the drawing I would like to show you what purports to be a print of a drawing and will ask if you can identify that.

A. Well, I would say yes, this is the drawing.

Q. That accompanied the letter?

A. That's it.

Q. Defendant's Exhibit E?

A. That's right.

Mr. Naylor: We will offer that as defendant's next in order, if your Honor please.

The Court: It will be received and marked.

The Clerk: Defendant's Exhibit F in evidence.

(Whereupon, the drawing referred to above was received in evidence and marked Defendant's Exhibit F.)

Q. (By Mr. Naylor): Now, Mr. Kerr, if you will examine Defendant's Exhibit F. Will you state

(Testimony of Theodore W. Kerr.)

what was your understanding of the proposed structure that was depicted in that sketch or print?

A. Well, the proposed structure here is a single tubular extrusion with four—five orifices.

Q. Will you locate the orifices, please, by reference to [358] this sketch?

A. Well, there is one orifice in the center and one in each of the four flat side welds.

Q. And the relative size?

A. The size of the orifices?

Q. Orifices.

A. Well, the size of the orifices on the side would be about equivalent to a $\frac{1}{8}$ th inch hole, and the one in the center approximately a half inch hole.

Q. And was that the interpretation you placed upon the drawing in 1948 when you first saw it?

A. That's right.

Q. Now if you will examine Defendant's Exhibit E again, I would like to point out wherein reference was made to a sample. I think you mentioned that as you referred to the drawing. What is said about a sample?

A. "A sample of which is being mailed you today by Pan American."

Q. Now, I would like to ask you, do you recall having received such a sample?

A. Yes, I do.

Q. Will you describe for the Court the construction and appearance of the sample that you so received?

(Testimony of Theodore W. Kerr.)

A. Well, the sample that I received consisted of eight pieces of acrylate sheet stock that had been fabricated and [359] cemented together to form a square tube—essentially a square tube with four orifices and containing a wooden stick in the main body of the center.

Q. Mr. Kerr, if I were to give you a sheet of paper could you sketch the layout of the several pieces of that particular sample as you recall it?

A. Yes, I can.

Q. Will you please do so. And may I ask the Court's permission for the witness to use a corner of the desk for that purpose?

The Court: He may.

A. (The witness drew on a piece of paper and handed it to Mr. Naylor.)

Q. (By Mr. Naylor): Returning to the sketch—incidentally, Mr. Kerr, would you mind noting your name and today's date on that sheet so that it will be readily identifiable?

A. April 28th?

Mr. Naylor: April 28th.

The Court: February.

Mr. Naylor: Pardon me; February. I had the sketch date in mind; I'm sorry.

I will offer that as defendant's next in order, if the Court please.

The Court: It will be received.

The Clerk: Defendant's Exhibit G in [360] evidence.

(Whereupon sketch referred to above was received in evidence and marked Defendant's Exhibit G.)

(Testimony of Theodore W. Kerr.)

Q. (By Mr. Naylor): Coming again to Defendant's Exhibit G, I wonder if you would be good enough to put some identifying references or numerals on that sketch in order to characterize it as you recall it. For example, will you put the reference numeral A on any section of the outer shell of the device? A. (Witness wrote on the sketch.)

Q. And then continuing around—I assume there are four sides? A. That's right.

Q. Continuing around the structure will you put the reference numerals B, C, D to denote the opposite sides?

A. (The witness wrote on the sketch.)

Q. That is the shell of the structure, is it, Mr. Kerr? A. That's right.

Q. Looking at the structure you have thus sketched, would you say there was an inner shell?

A. Yes.

Q. And of how many component parts does that consist? A. Four parts.

Q. Starting with the letter E, will you successively denote the four parts of the inner shell?

A. I have done it. [361]

Q. You have now denoted the eight pieces of which you spoke? A. That's right, sir.

Q. Now, Mr. Kerr, I notice some wavy lines or crosshatch lines in the center of the object which you have described and sketched. What is that intended to denote?

A. Well, that indicates the grain in a wood stick.

(Testimony of Theodore W. Kerr.)

Q. Will you draw a line to that and mark it with the word wood''?

A. (The witness wrote on the sketch.)

Q. And may I ask, based on your observation of the sample that came to you in 1948, was that wood square in cross-section? A. Yes, it was.

Q. It was. Now within the device that you have sketched here for us this morning are there any fluid columns or anything that would correspond or respond to the definition fluid?

A. Yes, there are. There are four of them.

Q. Will you mark the first with the numeral 1 and the others with successive numerals?

A. (The witness wrote on the sketch.)

Q. Now these occur where in your sketch in relation to each other?

A. Approximately in the center of each of the four flat sides.

Q. Do you have a definite recollection of how the orifices 1, 2, 3 and 4 had been formed in the sample that you observed in 1948? [362]

A. Yes, they were obviously cut in a piece of flat sheet stock with a table saw or router—one or the other.

Q. That is your recollection of it?

A. Yes, sir.

Q. And upon what did you base that observation, Mr. Kerr?

A. Well, the cutting marks were quite clear in the part and they were readily identifiable. As a

(Testimony of Theodore W. Kerr.)

matter of fact, no attempt had been made to polish them out.

Q. Would you tell the Court what those cutting marks would look like as you interpret cutting marks?

A. Well, they would look—well, pretty much like white streaks; I would say hardly scratches, but tool marks as they are known in the machine industry.

Q. Tool marks? A. That's right.

Q. And how would one remove those if he was so disposed?

A. Various ways. They can be sanded and polished out, or they can just be sanded and plain polished. Well, that's about it.

Q. Do you recall how long it was after you received Defendant's Exhibit E and the accompanying print before you received the sample of which you have been speaking?

A. I don't recall the time differential, but I would guess at it at this date that they were within about a week of one another. [363]

Q. A week of one another?

A. That's right.

Q. And I assume from that that the sample followed the letter and sketch or letter and print?

A. As I recall, I received the letter first.

Q. This sample that you observed in 1948 or received at Plastics Process Company, you say it had a wood filler and it was square in cross-section?

(Testimony of Theodore W. Kerr.)

A. That is right.

Q. Was there anything on the wood filler as you can recall it?

A. I don't recall exactly.

Q. Did you pay any attention to it?

A. Not too much except that I knew that somewhere there was to be a calibrated scale either on the wood filler or on the plastic.

Q. Did you examine it minutely at all?

A. I didn't examine it that close, no, sir.

Q. You were primarily concerned with what at that stage?

A. I was primarily concerned with the production of the extrusion——

Q. Now with further reference to his sample, was there anything in the ends of this sample that you observed?

A. No, everything was just flush; all the parts were just trimmed off even. [364]

Q. The wood? A. Yes.

Q. Was the wood flush with the outer shell?

A. It was flush with the plastic, yes, the outer shell.

Q. And was it flush with the inner shell as you have described it this morning? A. Yes.

Q. So what would we have—a square end under those circumstances? A. Yes.

Q. And that is your recollection of it?

A. That is my recollection of it.

Q. I would like to show you what has been offered here as Plaintiff's Exhibit 5, and it has been

(Testimony of Theodore W. Kerr.)

described as a replica of a certain dipstick. Will you please examine that and advise the Court whether or not it corresponds to your recollection of the sample dipstick that you received in 1948?

A. Well, as far as the way the stick is made and assembled, it is not at all the same.

Q. Will you please detail the differences as you understand them?

A. Well, the basic difference as far as the assembly is concerned is that this has been—this has been made up of a series of laminations that are just strips of plastic [365] material that have been cemented together. There is no machining—there is no machine cutting on this that I can see. There has been no attempt to saw slots in the sheet stock. These sheets have been cut to given widths and just laminated into an assembly.

Q. In the makeup of the inner and outer shells; is that right? A. That is right.

Q. Does it correspond to your recollection and as you have sketched it here this morning with respect to the center orifice?

A. The center orifice is the same.

Q. And the wood is the same, is it?

A. The wood is the same.

Q. And what about the four smaller outer orifices?

A. They are in approximately the same position as the original sample.

(Testimony of Theodore W. Kerr.)

Q. And do you note in Plaintiff's Exhibit 5 any end closure of the dipstick?

A. Well, there is—there appears to be an end closure on this one.

Q. Do you recall such an end closure being on the sample that you received?

A. No, there was no such thing.

Q. Now as a person engaged in the extrusion of plastics, what [366] was your reaction upon receipt in 1948 of the letter, Defendant's Exhibit E, the sketch, Defendant's Exhibit F, and the sample, Defendant's Exhibit G—correction: G as you sketched it?

A. Well, my reaction was that the design was not practicable for a plastic extrusion; it was not practical for production.

Q. Would you mind explaining to the Court in detail your reasons for that conclusion, Mr. Kerr?

A. Well, the reason that it was impractical, of course, was that the volume for a special extrusion was much too small to warrant the cost of the tooling.

The second reason was that the tooling was very nearly impossible to make; it could be made, but it would be extremely difficult to make a tube with five orifices and maintain the orifices to any sort of dimensional control. The top side would tend to collapse and the bottom would sag downward; it would take on a very erratic shape.

Q. Will you tell the Court just why that would be so?

A. Well, primarily because when plastic is ex-

(Testimony of Theodore W. Kerr.)

truded, it leaves the die in about the consistency of chewing gum, and this—the plastic material must then be stretched as it leaves the die and held in a cooling form to hold it to its proper shape, and the plastic material has somewhat of a tendency to be a little sticky, such as chewing gum. It is quite difficult to hold the material to its shape. And of [367] course the orifices are only supported by air pressure in the nature of about one or one and a half inches of water column pressure, which is very, very slight, and any variation in the pressures of any one of the five orifices will distort the plastic all out of proportion to the desired finished product.

Just one hint of an inch of water column pressure in excess in any one of the four orifices, it could conceivably come out twice as large as the adjoining orifice. So it would be difficult holding all of these factors to any sort of dimensional control.

Q. Is it true that plastic extruders are bothered by a problem i.d. control in any hollow-bodied member?

A. Yes, that is the most difficult type of control, is inside diameter control.

Q. And for the reasons that you have enumerated?

A. That is right.

Q. Now I assume that this particular device—you say it would be practically impossible to make——

A. That is right.

Q. —the dies and tools to give adequate control?

A. That is right.

(Testimony of Theodore W. Kerr.)

Q. Could it be done within the realm of good commercial practice, in your judgment?

A. No, it could not. [368]

Q. And the reason for that would be what?

A. Well, the tooling in itself would present a terrific problem, because very slender mandrills would have to extend up into what would be the wall of a square tube and would be subjected to the terrific pressures of the plastic flowing through the orifice that would constitute the wall of a square tube, and this pressure of the plastic would really tax the mechanical strength of the steel mandrills to the point where it would be difficult to get metal to stand up and do the job more than just once.

Q. In other words, there again you would have the i.d. problem, is that it?

A. Yes, we would have an i.d. problem there of keeping the orifice in its proper location. The mandrills would be so slender that they could very easily be bent either to the inside or to the outside wall of the essentially square tube

Q. And what would be the result of bending in either such direction?

A. It would result in a part that would not conform to the blueprint and would, in my notion, not be acceptable for production.

Q. Did you give any consideration in your own mind at the time of receipt of these three aspects of the tube, namely, the letter, sketch, and the sample

(Testimony of Theodore W. Kerr.)

of which we have been speaking, as to alternative ways of accomplishing the same [369] result?

A. Yes, I did.

Q. And with what result, if any?

A. Well, when I saw how nearly impossible this product would be to be made, I felt that the next step would be to simplify the design so that it could be produced.

Q. May I interrupt you at that point. What was your training prior to your first employment by Plastics Process Company, Mr. Kerr?

A. Well, I had worked as—worked eight years as an employee of Douglass Aircraft Company.

Q. In what line of work were you engaged?

A. I was engaged in sheet metal fabrication.

Q. And what was the range of your experience in that? I mean what were you concerned with?

A. Well, the range of experience was from a sheet metal worker to a supervisor of production in the sheet metal department.

Q. Now will you continue with your description of what occurred to you at the time of seeing these exhibits?

A. Well, immediately when I saw the exhibits I felt that the thing to do was to simplify this item so that it could be produced in small quantities.

Q. And will you tell the Court briefly what you did in that regard, if anything? [370]

A. Well, I took it upon myself to make a square clear butyrate tube on some tooling that we had in existence for another product, and then I took some

(Testimony of Theodore W. Kerr.)

quarter inch tubes which we happened to have in stock at the time and assembled those with a wood stick so that the round tube was in the corner of the stick rather than on the flat center side and that two scales could be read from a single fluid column.

Q. You mentioned that you first produced a tube of clear plastic with tooling that had been set up or made for another product. What was that other product?

A. The other product was a square towel bar—a plastic towel bar.

Q. Of the type used in a domestic bathroom, for example, or kitchen? A. That is right.

Q. And what did you do with that tooling? Did you actually draw a tube or extrude one?

A. Yes, I produced—I extruded a clear plastic tube through the sizing tooling to make a square plastic tube.

Q. I direct your attention to Plaintiff's Exhibit 7A and will ask if the clear tube that you extruded corresponded substantially to that?

A. That is exactly the same thing as I produced.

Q. With the towel bar—

A. Tooling. [371]

Q. Tooling. And you mentioned a smaller tubing. In that connection I will show you Plaintiff's Exhibit 7B and 7C and will ask if they correspond to the tubing that you saw?

A. They are exactly the same.

Q. Was that particular tubing, 7B and 7C, a standard article of production of the Plastic Process

(Testimony of Theodore W. Kerr.)

Company at that time? A. Yes, it was.

Q. Now, Mr. Kerr, will you please take Plaintiff's Exhibits 7A, B and C and with your hands assemble the same—— A. You can't——

Q. ——in position to indicate what your thinking was with respect to the disposition of the small tubes within a large tube?

A. Well, you can't hold it—you can hardly hold it in position. This is essentially the way the pieces went together, however.

Q. You were then faced with the problem of holding it? A. That is right.

Q. In that particular assembly, is that right?

A. That's right.

Q. What if anything did you personally do with respect to developing or producing an indication of how that might be done?

A. Well, I took a strip of wood and cut four—well, cut four soft cuts, two notches on adjacent corners—I should [372] say on opposite corners.

Mr. Naylor: May this be marked as Defendant's next for identification, please?

The Court: So ordered.

The Clerk: Defendant's Exhibit H for identification.

(Whereupon assembly referred to above was marked Defendant's Exhibit H for identification.)

Q. (By Mr. Naylor): Mr. Kerr, I show you an assembly, which I will represent to the Court and to

(Testimony of Theodore W. Kerr.)

opposing counsel is one prepared especially for demonstration purposes only and of recent preparation, and will ask if Defendant's Exhibit H for identification illustrates approximately what you did in working up the assembly that you have been describing.

A. Well, this is—this is, I would say, exactly the same as the one we made. It has the saw cuts in the edges the same as we made the original assembly.

Q. Will you tell the Court what you personally did in making those saw cuts? How did you go about it?

A. Well, I just took a board, and it works out that a piece of, I think it is three-quarters wood is just about the size that fits inside of this three-quarter inch square tube, so we cut it to the width that would be required to make it into a square, and then we made a setup on a table saw with a fence alongside of the saw blade, raised the saw blade up approximately a quarter of an inch and pushed the strip [373] through the saw four times on a single setup—four passes over the saw blade, and the square was cut out of the two opposite corners.

Q. Actually what you were doing was removing the opposing corners? A. That is right.

Q. Of the stick that you had originally squared; is that correct? A. That is right.

Q. Removing them in the sense that you removed a sufficient amount of the wood to permit the tubes to be inserted in the recesses?

(Testimony of Theodore W. Kerr.)

A. That is right, to leave room enough for the tube because we inserted the wood afterwards.

Q. And it is your recollection that Defendant's Exhibit H for identification corresponds approximately to the result of the work that you did in Los Angeles? A. That is right.

Q. After you had done this, did you actually make an assembly of the pieces that you had thus prepared?

A. I made an assembly just like that one there.

Q. Like Defendant's Exhibit H for identification? A. That's right.

Q. And what did you do with that?

A. Well, I sent it to Mr. Welch. [374]

Q. In San Francisco?

A. In San Francisco.

Q. And did you send it with any sort of communication?

A. I believe I did. I don't recall; I believe I did, though.

Mr. Naylor: I think you have already seen this.

Q. I will show you an original communication dated May 11, 1948, and I will ask if you can identify that? A. That is it exactly.

Q. Is that the communication you addressed to Mr. Welch? A. That is the letter.

Q. There are several questions I would like to ask you about this letter. In the first place it is upon what kind of a letterhead?

A. An inter-house letterhead.

(Testimony of Theodore W. Kerr.)

Q. And was that employed in your communications with Mr. Welch at times?

A. Yes, it was employed.

Q. And addressed to whom—Mr. Welch?

A. Yes, it is.

Q. At San Francisco? A. That is right.

Q. And is the subject matter of the letter indicated? A. Yes, it is.

Q. And what does it say? [375]

A. It says: "We received the sample dipstick from Pan-American."

Q. Excuse me, Mr. Kerr; I am speaking of the subject in the sense of the printed portion.

A. "P.A.A."

Q. Is there any reference in the body of the letter to the sample dipstick to which we have been referring earlier as the one that came to you?

A. Yes, there is.

Q. And will you state what it says there?

A. "We received the sample dipstick from P.A.A. yesterday."

Q. Yesterday. And this letter is dated what date?

A. May 11th.

Q. Is there any reference in this letter to what you did upon receipt of that sample?

A. Yes, there is.

Q. And what does it state?

A. "And we immediately proceeded to simplify same and are returning the results to you today."

Q. And from that do you gather that the sample was sent on that same day to Mr. Welch?

(Testimony of Theodore W. Kerr.)

A. Yes.

Q. Now you spoke earlier, in describing your reaction to Defendant's Exhibits E, F and G as you sketched it as being impracticable from the standpoint of cost. Did you express [376] that thought to Mr. Welch in this communication?

A. Yes, I did.

Q. Will you state how you expressed it?

A. "As we could hardly make a die for this section and keep the price within reasonable range, we decided to use the standard extrusions."

Q. And the standard extrusions to which you referred were those that you have just been describing to the Court? A. That's right.

Q. Standard in the sense of tooling for the outside tube was already in existence?

A. That's right.

Q. And further that the smaller tubes were a regular item? A. That's right.

Q. Is there any reference in this letter—and if there is I wish you would point it out—to the characteristics of the dipstick sample that you have described to the Court this morning, namely, Defendant's Exhibit H for identification?

A. Well, in the second paragraph I said, "As you can see each round tube surfaces two scales and a tube is allowed to extend above the top for ease of operation."

Q. And "above the top for ease of operation"—what does that have reference to, if you can de-

(Testimony of Theodore W. Kerr.)

scribe it in relation to Defendant's Exhibit H for identification?

A. Well, I would call this the top because the tube extends [377] up far enough so that a thumb can apply pressure to seal off the top of the tube.

Q. Now at that stage, at the time of writing this letter of May 11th, 1948, what was the extent of the interest of Plastic Process Company in articles of this type? Was it interested in the complete assembly or the components?

A. Just the components.

Q. And is there any reference to that in this communication of May 11, 1948?

A. Yes.

Q. Will you state where it appears and how it appears?

A. In the last paragraph: "While we do not like to get too involved, I should like to quote on all of the components, as that would enable us to furnish an assembly ready for calibration with assurance that all the parts will go together."

Q. And that was an expression of the interest of your company in the subject matter?

A. That's right.

Q. As of that time?

A. That's right.

Mr. Naylor: I will offer that, your Honor, as Defendant's exhibit next in order.

The Court: Let it be received.

The Clerk: Defendant's Exhibit I in evidence.

(Whereupon letter of 5/11/48 referred to above was received in evidence and marked Defendant's Exhibit I.)

(Testimony of Theodore W. Kerr.)

Q. (By Mr. Naylor): Now what next did you do, if anything, or have to do in relation to this dipstick, as an officer of Plastic Process Company, after sending the sample to Mr. Welch?

A. I actually had nothing more to do except to wait his orders for production.

Q. Was such an order forthcoming?

A. Yes.

Q. Did you receive such an order?

A. I got an order for tubing.

Q. From whom? A. From Mr. Welch.

Q. Do you recall approximately how long it was after you sent the sample that you received such an order from Mr. Welch?

A. I don't recall how long afterwards, no.

Q. Mr. Kerr, I hand you what purports to be a copy of a communication dated June 9, 1948, and will ask if you can identify that or if you had anything to do with it?

A. Yes. Yes, there is a reference to me.

Q. And where does it occur?

A. In the third paragraph. [379]

Q. Will you state what is the reference to you?

A. It says, "As mentioned to Ted over the phone, I am going to make up 100 only dipsticks complete with printed scales and plastic plugs in each end."

Q. And is there any reference to the other aspects of the order that he was seeking?

A. Yes. "These people originally asked us to quote on 300 units. However, the engineer informs

(Testimony of Theodore W. Kerr.)

me that now he will only be able to order 100 units. They may take another hundred or so at a later date.”

Q. Was there communicated in that any reference to permission to Mr. Welch to contact other airlines?

A. Not in this—not in this communication.

Q. I direct your attention to the next to the last paragraph.

A. Oh. Yes; I didn't look down that far. There is a reference to other airlines.

Q. Coming back now to the reference to you and the conversation with you over the phone, were you in telephonic communication with Mr. Welch from time to time about these matters?

A. Yes, I was.

Q. And do you recall talking with him in this period, namely, June of 1948, over the long distance phone in reference to dipsticks?

A. Well, I recall a discussion with him regarding the [380] dipsticks, and it undoubtedly fell within that period.

Q. I will show you again Defendant's Exhibit E, Mr. Kerr, and will ask if there is a reference in that particular communication, namely the May 3rd, 1948 letter, to other airlines as potential customers for the device?

A. Yes, I have the copy of that here. Yes, there is a mention in it in the next to the last paragraph.

Q. How did you receive that as an officer of

(Testimony of Theodore W. Kerr.)

Plastic Process Company as an indication of market?

A. I received that favorably because it indicated that there was a potential market greater than just Pan-American Airways; and of course it made the item more interesting to us as a production item.

Q. Will you also examine that communication, Defendant's Exhibit E, and state whether or not there is a reference there to the type of devices that this dipstick was intended to supplant or replace?

A. Yes, it says, "They are presently using metal and wood sticks."

Q. That is sufficient.

Mr. Naylor: I think that last communication of June 9th has not yet been identified. If I may, I would like to have it marked merely for identification as defendant's next at this time.

The Court: Let it be marked. [381]

The Clerk: Defendant's Exhibit J for identification.

(Whereupon letter of June 9 referred to above was marked Defendant's Exhibit J for identification.)

Q. (By Mr. Naylor): Next, Mr. Kerr, I would like to show you what purports to be a copy of a communication from Mr. Welch to you and Mr. Wenk under date of June 23rd, the year date not being specified, and I will ask if you can identify that.

A. Yes, I can identify this.

Q. Does this have reference to the subject mat-

(Testimony of Theodore W. Kerr.)

ter of the dipstick? A. Yes, it does.

Q. And is it so identified?

A. It is so identified.

Q. And is there an indication in this of an order from Mr. Welch? A. Yes, there is.

Q. For tubing? A. There is.

Q. I will show you another document dated June 23rd with no year date specified, and I will ask if that is one of the copies of the order referred to in the other communication of June 23rd.

A. Yes, that is.

Q. How do you identify it? [382]

A. Well, I identify it by the special house account.

Q. Is that referred to on the face of the document? A. That's right.

Q. And at what portion or at what point?

A. At the lower portion where it says "Terms."

Q. And there has been an insert, "Special house account"?

A. Well, I would interpret this as meaning, "I want a special price."

Q. To what does the order of June 23rd refer to in the way of numerical count of things and what things?

A. Well, it refers to 115 pieces of square tubing, clear plastic cellulose acetate butyrate.

Q. Wait a minute. You identify that. Why did you identify it? A. C.A.B.

Q. Is that the abbreviation for cellulose acetate butyrate? A. That's right.

(Testimony of Theodore W. Kerr.)

Q. Is there a dimensional indication?

A. Yes, there is.

Q. And what is the dimensional indication?

A. Three-quarters by three-quarters inches square with a 30 thousandths wall, 36 inches long.

Q. And what is the next item called for in this particular document?

A. 230 pieces of round tubing, cellulose acetate butyrate [383] clear.

Q. And dimension-wise, how is that expressed?

A. An inch and a quarter o.d. By a 60 thousandths wall, $36\frac{1}{8}$ inches long.

Q. Do you see any reference there to anything else that is identified on that particular document?

A. Yes, it says, "See attached print."

Q. Print?

A. Print. There is evidently a typographical error but it means "print."

Q. I see. Now going back to Defendant's Exhibit H for identification, after you assembled this particular device I understand you sent it to Mr. Welch?

A. That's right.

Q. And do you recall whether or not you sent more than one assembly or just the one assembly?

A. Just one.

Q. As we see it depicted in Defendant's Exhibit H for identification?

A. That's right; just one.

Q. Mr. Kerr, directing your attention specifically to the June 23rd communication, I would like to ask you if there is any question or request directed

(Testimony of Theodore W. Kerr.)

to you by Mr. Welch concerning the ultimate construction of the dipstick?

A. Yes, I see two questions here. [384]

Q. Will you point them out to the Court and explain what you understood them to be?

A. Well, one of them asking me if I had a couple of pieces of square tubing that would enable—of any color which would enable Mr. Welch to cut some wood to fit the square tubing; and the other is asking if I have any recommendations for plugging the ends of the square tube.

Q. And is there any reference to a particular plug?

A. Yes, it says here, "The print shows a 11/32 plastic plug that has to fit over each end of the wood acting as a sealer and perhaps adding to the strength of the sections."

Q. And it concludes with an expression of appreciation for any suggestions, does it not?

A. That is right.

Q. Is there any reference in the June 23rd communication to a desire on Mr. Welch's part to have samples of this device—and in the interests of time I will direct your attention to the postscript.

A. Well, he wanted to give samples to the other airlines.

Q. Well, that takes us back to the order. Now I see 115 pieces of the square tubing and 230 pieces of round tubing. How many completely assembled sticks would that produce if all of them were used?

A. That would produce 115 complete dipsticks.

(Testimony of Theodore W. Kerr.)

Mr. Naylor: If the Court please, I will offer the June [385] 23rd, the year date being missing, communication as Defendant's next for identification.

The Court: Let it be received.

The Clerk: Defendant's Exhibit K for identification.

(Whereupon, letter of June 23, referred to above, was marked Defendant's Exhibit K for identification.)

Mr. Naylor: And the order dated June 23rd, the year date being missing, as Defendant's next for identification.

The Clerk: Defendant's Exhibit L for identification.

The Court: I suggest we take the recess now so counsel can go over to Judge Roche's court.

Mr. Naylor: Thank you, your Honor.

(Recess.)

Mr. Naylor: I have just one or two questions to ask.

Q. Mr. Kerr, do you have any interest in Mr. Welch's business of any sort?

A. None whatsoever.

Q. You have no connection with him at present?

A. None whatsoever.

Mr. Naylor: That is all.

(Testimony of Theodore W. Kerr.)

Cross-Examination

By Mr. Swain:

Q. In this Welch Exhibit E, which is the letter which was addressed to Mr. Wenk, you indicated that there was a sketch attached thereto, did you not, or rather a drawing—excuse me. [386]

A. There is a sketch in the letter, yes.

Q. I misspoke myself; I meant a drawing. And did you say that it was this Exhibit F?

A. That's right.

Q. Do I gather that that is the very drawing or the very piece of paper which was received?

A. Well, I would say it is the very one exactly.

Q. Do you recall whether you are the one who opened that letter?

A. No, I am not the one.

Q. How did you know, then, that it was the drawing which was received?

A. Well, we have a simple procedure: the girl in the office opens all of the mail and distributes it to the different personnel who are interested in the correspondence matter. Unless it is personal mail, we never open any company mail.

Q. Could it have been any other drawing, do you know?

A. I would say it could not have been any other drawing.

Q. Were you aware that the sample dipstick which was being sent down to you had the ends sealed before you saw the dipstick?

(Testimony of Theodore W. Kerr.)

A. They could not have been sealed; they were sawn off flush; the ends of the wood and the plastic were just sawn off square.

Q. I am talking about the sample which was sent to you by [387] Pan American.

A. That is what I have reference to.

Q. Were you aware that in a usable or commercial dipstick the ends would have to be sealed?

A. I had no idea that was necessary.

Q. You were aware, however, were you not, that there was a calibrated scale in the dipstick?

A. Yes.

Q. And you were aware that that was to be pasted to a wooden filler?

A. My recollection is that there was a calibration to be worked in conjunction with the fluid column, but just how it was to be installed I don't know; I don't recall.

Q. I refer you to the letter which you hold in your hand, Exhibit E, and ask you if there is an indication in the fourth paragraph that the graduate scale was to be pasted thereon.

A. Well, I had forgotten about that.

Q. You mean you had forgotten about it now?

A. That's right.

Q. But at the time, then, after receiving that letter, were you not aware of the fact that the ends should be sealed? And in that connection I show you the last line of the fourth paragraph of that letter.

A. "Maybe a square tube closed on both ends

(Testimony of Theodore W. Kerr.)

or—" I have [388] no conception of the meaning of that last line.

Q. Then it is your interpretation of that paragraph then that the ends did not have to be sealed?

A. Well, the ends of the finished product that was furnished me was a solid mass at the time; that is, there was no cavities, there was no room for sealing anything. I just can't conceive how you could have gone about sealing it.

Q. Then you were not aware then of the fact that you would have to seal the ends so that the gasoline wouldn't run up into the graduated scale; is that right?

A. To be honest with you, I was surprised to learn that was necessary.

Q. When did you first learn that plugs were necessary in the ends of this device?

A. As I recall, it was either a telephone call or a letter that Mr. Welch brought it to my attention that it was necessary to plug the ends before the product would be usable.

Q. And was that after you submitted the sample of which Defendant's Exhibit H is a replica, or was it before you made this sample? Do you recall that?

A. No. I learned that the plugs or the ends had to be plugged after I had furnished the sample. I thought that I had furnished a production part ready to go to work.

Q. How did you contemplate then that the scales would be used on this wood filler? [389]

A. Well, as I say, I had forgotten how the scale

(Testimony of Theodore W. Kerr.)

was going to be put on there. My only interest was in the simplification to show that a scale—two scales could be read from a single fluid column. That was my purpose in designing and submitting a sample to Mr. Welch. That was my sole purpose in doing that. I might add that I was not interested in making a finished product and——

Q. You were interested in supplying parts from which a finished product could be made, weren't you? A. That is right.

Q. So that at the time you submitted this thing you did not care how the ends were to be sealed?

A. I didn't know they were to be sealed.

Q. Did you do anything or take any steps toward complying with the request in Mr. Welch's letter to you, Exhibit E, between the time you received the letter and the time you received the sample dipstick about which you have testified?

A. I don't recall having done anything until I saw the dipstick.

Q. And then in a matter of a day or so you came up with the sample, Defendant's Exhibit H?

A. That's right.

Q. Do you have the sample which was sent you by Pan American Airways about which you have testified? A. No, I do not have it. [390]

Q. Have you made a diligent search for it?

A. This matter was brought to my attention after I left the company, and the company had moved to new quarters and I only offered suggestions where it might be found, that was all.

(Testimony of Theodore W. Kerr.)

Q. After you received the stick do you know what happened to it? A. Yes, I do.

Q. What?

A. It was kept in the sales office I would say fully two years after that.

Q. Was it dismantled? Excuse me; go ahead.

A. No, it was not dismantled; it was assembled.

Q. There was no attempt made to take it apart?

A. No, sir.

Q. Did the wooden filler slide out?

A. I don't recall of it ever having slid out.

Q. Could you look in the end and see the wooden filler and the paper chart around it?

A. I don't remember the paper chart on it; I do remember the wooden filler.

Q. A paper chart is described in the letter though, isn't it?

A. Yes, it is described here, but I had forgotten it.

Q. When you wanted to quote on samples, were you also [391] including the cost of the wooden filler in that quotation? A. No, sir.

Q. It was your idea that Mr. Welch would supply those? A. That's right.

Q. And is that expressed anywhere?

A. I don't recall whether it was expressed in letter or a telephone conversation, but I know I have informed Mr. Welch some time during that general period that we did not—we were not interested in producing a dipstick and that we suggested that he

Testimony of Theodore W. Kerr.)

get someone up in the San Francisco area to produce the finished product.

Q. And you were equipped the, or rather, you contemplated then only providing the outer square extrusion and the two tubular extrusions?

A. That was what we proposed to furnish—that alone.

Q. After you received the letter, Exhibit J, which mentioned the plugs, did you give any thought to making plugs?

A. Is that the question?

Q. Yes.

A. I had no idea what would be the best method of making a plug or plugging the end. As a matter of fact, I can't recall even making any suggestions.

Q. Do you recall whether you discussed it around your plant?

A. I would say that the only discussion I would have or I [392] might have had would be that I didn't know what would be the best method to plug the ends and had no suggestions to offer.

Q. Well now, Mr. Kerr, if a dipstick were made in accordance with this sample without any plugs in the end or with no sealing in the end and there was a paper graduate scale pasted to the wooden filler, would that be a suitable dipstick?

A. Well, we know now that it should be plugged, but at the time I didn't think that it would have any interference, because sticks had been used to immerse in the gas tanks for gauging in the past.

Q. But you were aware, were you not, it was to be used for gasoline?

A. That's right.

(Testimony of Theodore W. Kerr.)

Q. And you were also aware that a paper graduate scale was going to be pasted on here?

A. As I say, I don't recall that that is the way it was going to be handled.

Q. Since you have refreshed your recollection by reading that letter, isn't that a normal conclusion to draw, that that is the way it would be handled?

A. It is a good conclusion, yes, sir.

Mr. Swain: That is all from me, Mr. Naylor.

Mr. Naylor: No further questions. [393]

The Court: You may step down, Mr. Kerr.

Mr. Naylor: May I inquire as to what is your Honor's disposition from this point on? Your Honor has called attention to this authority which you have indicated supports the motions that were made or one of the motions that was made yesterday. Is it your Honor's wish that we proceed with the evidence?

The Court: I think I prefer that you proceed Mr. Naylor, to carry that thing on to a conclusion. Then I may dispose of your motions at the conclusion of all the testimony.

Mr. Naylor: Very well, your Honor. Thank you Mr. Welch, will you take the stand? [394]

C. MARTIN WELCH

the defendant herein, called as a witness in his own behalf; sworn.

The Clerk: Will you please state your name and occupation for the record? Your name and occupation?

A. C. Martin Welch. I am the owner of C. Martin Welch & Company, operating under three separate entities; one, manufacture and sale of aircraft parts; two, the representation of a plastic molding company in Los Angeles; three, a ski resort in the Sonora region.

Direct Examination

By Mr. Naylor:

Q. I would like to ask you, for purposes of the record, what does the initial C. in your name stand for? A. That is for Cyril—C-y-r-i-l.

Q. Will you please state to the Court what your educational background has been?

A. I graduated from high school in North Dakota; I attended college for seven years, Gonzaga University in Spokane, Washington, and University of California at Berkeley.

Q. What did you major in at Gonzaga?

A. I started out with a pre-law course and shifted upon determining that it was six years and my athletic scholarship wouldn't carry on that long and I shifted to a business ad course.

Q. Business administration? [395]

A. Business administration.

(Testimony of C. Martin Welch.)

Q. What studies did you pursue at the University of California?

A. Essentially I took math and calculus, some chemistry courses and all of the plastics courses they had to offer at the time. I believe they were six in number running nine months each—running from a six to nine months' period.

Q. These courses that you took at the University of California, were they day courses or evening courses?

A. Evening courses.

Q. Were you gainfully employed at the time you were pursuing these studies at the University of California?

A. Yes, sir.

Q. Where were you employed?

A. Moore Drydock Company in Oakland, California.

Q. And what was your occupation? I mean, what was the nature of your employment there. Mr. Welch?

A. I started at Moore Drydock, I believe it was in 1940, as a steel worker, and when I finished in 1945 I was supervisor of all steel erection on waterfront areas around the Bay for that concern, the position I worked into almost within one year after I started working there.

Q. And your employment with Moore Drydock terminated at what time?

A. September of 1945. [396]

Q. And what did you do thereafter?

A. I was referred to a particular company by one of the instructors that had taught me at the

(Testimony of C. Martin Welch.)

University of California, taught my plastic courses. I had advised him I wanted to pursue my activities in the plastic field. He recommended me to someone who hired me upon my first interview.

Q. And who was that?

A. Donald Kenneth & Company.

Q. I beg pardon?

A. Donald Kenneth & Company who at that time operated a plastic division. I was put in charge of it. They were then the representatives for the Plastic Process Company, whom I later took over—the representation of which I later took over.

Q. Did you later become the representative of Plastic Process Company?

A. Within a short time after I started for Donald Kenneth & Company.

Plastic Division was dissolved and I represented Plastic Process Company.

Q. And does that representation continue to this date? A. Yes, it does.

Q. Now, aside from these gainful occupations that you have mentioned, did you have any connection with amateur athletics? A. Yes. [397]

Q. Would you state what that is, please?

A. I presently officiate at football games for the Pacific Coast Conference.

Q. And how long have you done that?

A. Ten years.

Q. Now, you mentioned some of the products with which you are concerned. Do you have any connection with dipsticks of any kind?

(Testimony of C. Martin Welch.)

A. Presently?

Q. Yes.

A. I manufacture a variety of dipsticks I sell to the airline industry.

Q. What was your first personal connection with dipsticks of any kind, Mr. Welch?

A. The first connection with dipsticks of any kind was upon contact with Pan American Airways through Eugene Grindle. Correspondence has established the initial contact as at May approximately 3rd or 4th, 1948.

Q. And that was your first contact with dipsticks as a subject of manufacture and sale?

A. For the aircraft industry, I would say that was.

Q. Now, will you tell us about this contact with Mr. Grindle? I assume that is the Mr. Grindle, the plaintiff in this action.

A. That is correct. [398]

Q. That is the gentleman who is sitting here in court? A. Yes.

Q. Will you tell us how that contact came about?

A. My first contact with him was from a telephone call by him.

Q. Did you see him on that day or did this call precede your first meeting with Mr. Grindle?

A. It preceded my first meeting with him. I don't recall whether I saw him in his office that day or several days later.

Q. That prompts me to ask: Where is your office located in San Francisco?

Testimony of C. Martin Welch.)

A. 55 New Montgomery Street.

Q. And where do you reside, Mr. Welch?

A. In Millbrae, California.

Q. On what street in Millbrae?

A. 1324 Vista Grande.

Q. Vista Grande? A. Vista Grande.

Q. In what part of Millbrae is that situated?

A. It is in the Highlands district next to the Skyline Boulevard.

Q. It is proximate to the Skyline Boulevard?

A. Yes.

Q. Do you know where Pan American's local facilities are? [399] A. Yes.

Q. Where?

A. The old International Airport seaplane base, I guess, would be the best way to identify it, just north of the present San Francisco International Airport.

Q. On the occasion of this first call from Mr. Grindle, will you state your present recollection of the purpose of that call? What did he ask for?

A. Inquiring about a method of manufacturing a plastic dipstick.

Q. And was any description of the actual make-up of the stick given to you in the initial telephone call?

A. Not as I recall, Mr. Naylor.

Q. Was it a general discussion or was it a detailed discussion?

A. Rather a general one. He requested that I stop by and see him at his office.

(Testimony of C. Martin Welch.)

Q. He requested that you stop by. Did you do so?

A. I did so, yes. I don't recall whether I saw him on the way home that day or on the way into work the next morning, or several days later, but it was en route either to my office or from it that I visited Mr. Grindle at his office.

Q. Do you recall what Mr. Grindle's position was with Pan American at that time?

A. Yes, he was an engineer, in the engineering department; [400] draftsman, I guess.

Q. And did you see him personally on the occasion of your first call at the Pan American facility?

A. Yes.

Q. And will you tell the Court what ensued? What did Mr. Grindle represent to you as to what he wanted you to do, if anything?

A. He asked—he inquired as to the availability and price of an extrusion, showed me a drawing of that extrusion, told me what it was to be used for, and also showed me a dipstick fabricated out of lucite with, to the best of my recollection, holes appearing on the four surfaces drilled from the outer surface in such a manner as to trap gasoline up to a certain level—holes in series; quite a number of holes drilled all along the outside upwards from the bottom at a slanting angle downward that would trap fuel in them.

Q. At a slight angle, you say, An angle from what? The perpendicular axis of the stick itself?

A. Yes, from the perpendicular axis running

Testimony of C. Martin Welch.)

downward if you would hold the stick upright top
to bottom with the bottom up.

Q. Would you describe these as traps or cups?

A. That would be a very good description of
them.

Q. Did you say he showed you a sketch?

A. A drawing, I believe it was. [401]

Q. I would like to show you Defendant's Exhibit
F, and I will ask you if that is a sketch or a print
of the sketch that Mr. Grindle exhibited to you.

A. I have reason to believe, Mr. Naylor, that this
is the exact print.

Q. And what is the reason you have for such a
belief, Mr. Welch?

A. At the time I inquired—apparently inquired;
I don't remember it, but it is apparent that I would
have inquired as to tolerances and where initially
I wrote down on this drawing, "any tolerances
D.K.," I then erased it. It appears to this day and
it definitely is my handwriting.

Q. It is your handwriting?

A. Unless I have one alive that can produce it
exactly as I do, this certainly is mine.

Q. You recognize it as such, do you?

A. Yes.

Q. And what is your best recollection as to the
time when you may have written this language on
the print?

A. Well, sir, Mr. Naylor, to my best recollection,
it would have been shortly after I first seen it. It
didn't necessarily have to be that day, but it would

(Testimony of C. Martin Welch.)

have to have been I believe that day or the next, because I believe I immediately sent this drawing to Los Angeles and I didn't see it again until I located it in the files of the Plastic [402] Process Company.

Q. I would like to ask you about that. When did you see it the second time after you had sent it to Plastic Process Company?

A. I don't recall of seeing it until September or October in 1953.

Q. 1953? A. Yes.

Q. And what was the occasion of your seeing it on that particular date or at that particular time?

A. My occasion for searching for it, shall we say?

Q. Yes.

A. I had been contacted by Mr. Fox of Pan American and asked to visit him. I saw Mr. Fox in company with, as I recall, Mr. Kiester and Mr. Boyle.

Q. Kiester and Boyle?

A. Kiester and Boyle.

Q. All right.

A. They presented to me a drawing which I recognized then, as I do now, of a drawing made in 1948 of a dipstick assembly the likes of which I presently and have always furnished them, stating it was designed by one of their employees and that I made the dipsticks from the drawing. I told them about a drawing something like this and they denied the existence of such a drawing. [403]

(Testimony of C. Martin Welch.)

Q. Did you then institute a search in an effort to locate such drawing or such print?

A. My point of defense with them, Mr. Naylor, was that they were being told falsely that the drawing they were showing me was the original drawing and that I would try to produce a copy of the original drawing which was quite different than the drawing——

Q. All right; without going into detail at this particular point, will you tell us what you did to locate a print, if you did locate such a print?

A. I went back to my offices and looked through my own files and I could not. As I recall very definitely, I called Los Angeles and asked them if they would still have their old files. They said that if they were separated from a group of storage parts or files that had not been stored in a particular warehouse of theirs that had been burned down several years before, why, they might still be available. And I immediately proceeded to Los Angeles.

Q. And did you personally cause a search to be made or did you make a search?

A. I located the drawing myself, this particular drawing myself, in the files marked "C. Martin Welch" of 1948.

Q. And is it your belief that Defendant's Exhibit F is the exact print?

A. I wouldn't know how another type of print would have [404] gotten in their files, Mr. Naylor, and that causes me to believe that that is the exact one that was sent there, plus the fact that my hand-

(Testimony of C. Martin Welch.)

writing is on it, which I recognize. It was on it then as can be proven by the photostats I had made of it when I returned.

Q. Since locating this particular print at Plastic Process Company, has this particular print, Defendant's Exhibit F, remained in your custody?

A. Yes.

Q. Except for the time that you gave it to me?

A. Except the time I gave it to the photostater to have copies made.

Q. Did you have copies made of it?

A. I had, as I recall, three copies made.

Q. And did you supply Mr. Fox with any of those copies?

A. I supplied a copy to Mr. Boyle and a copy to Mr. Fox and retained one myself.

Q. You have described several proposed devices that were exhibited to you by Mr. Grindle on the occasion of your first visit to his office at Pan American. One was a device with the holes drilled in the sides on an angular basis? A. Yes.

Q. To provide traps for the gasoline or fuel. Will you describe anything else that was exhibited to you at that time? [405]

A. To the best of my recollection, the only other dipsticks that I saw at that time were the normal wooden or an exact dipstick that was presently in use which appeared to be a four-sided piece of wood with calibrations stamped thereon.

Q. Was that the type that was in use at that time?

(Testimony of C. Martin Welch.)

A. That is correct. It is one of the types that were in use at that time.

Q. I show you Plaintiff's Exhibit 5 which has been represented here as a replica of a 1948 device, and I would like to ask you to examine that, if you will, Mr. Welch, and state whether a device corresponding exactly or substantially to that was exhibited to you by Mr. Grindle on the occasion of your first visit?

A. I, until my visit to the courtroom, had never seen a sample of a dipstick like this.

Q. You had not?

A. I had not. I was told at the time by Mr. Grindle that one was being fabricated by their shops—one was being fabricated that was in effect, in shape, a duplicate of the drawing you showed me. He also informed me that he would send this to Los Angeles; he didn't give it to me.

Q. He didn't give it to you?

A. He didn't give it to me or show it to me; it was not in his office at that time.

Q. Do you have a positive recollection of [406] that?

A. Well, it might be awfully hard to remember dates. I think that you can remember what you have seen before that was so close to your present field like a dipstick. I have been interested in dipsticks for eight years and it seems so unlikely to me that I would have forgotten if he gave it to me.

Q. Do you have any recollection of his handing

(Testimony of C. Martin Welch.)

you a dipstick corresponding to Plaintiff's Exhibit 5? A. Absolutely none.

The Court: I think we will take a recess now until 2:00 o'clock this afternoon.

(Whereupon, an adjournment was taken to 2:00 o'clock p.m. this date.) [407]

Tuesday, February 28, 1956—2:00 P.M.

* * *

C. MARTIN WELCH

resumed the stand.

Direct Examination

(Continued)

By Mr. Naylor:

Q. At the noon recess, Mr. Welch, we were talking about your first call on Mr. Grindle at Pan American as a result of his inquiry to you, is that not so? And you had mentioned the fact that a print of a sketch had been handed you.

A. That's right.

Q. In that conversation you mentioned, as I recall it, that at least one sample of a different dipstick had been shown you? A. That's correct.

Q. Namely, the pocket stick. What did you do after the call on Mr. Grindle, what was your next move in this matter? [408]

A. I would have—had I called on Mr. Grindle on the way home that night, I would have waited

(Testimony of C. Martin Welch.)

until the next morning to write the letter to the plant that has been produced in evidence in court here and forward the print.

Q. Excuse me. Do you mean to the Plastic Process Company?

A. To the Plastic Process Company.

Q. In Los Angeles. And they were your principals in this matter, were they not?

A. That's right.

Q. I show you now Defendant's Exhibit E and will ask if you can identify that for the court.

A. I can identify it.

Q. Is that the communication that you wrote to Plastic Process Company after the initial call on Mr. Grindle? A. That's correct.

Q. And without going into the detail of the letter, will you be good enough to examine it and state whether or not there is any reference in that communication to the subject matter, and if so, state where it appears?

In the interest of time I will direct your attention to the printed portion of the letter form appearing at the top.

A. Oh, "Subject: Pan American Airways."

Q. Now is there any reference in that communication to a drawing or a print of a drawing?

A. In the first, opening paragraph of the letter, "The [409] enclosed drawing is a section of a fuel tank measuring stick, sample of which is being mailed to you today by Pan American."

Q. Was it your understanding as of the date of

(Testimony of C. Martin Welch.)

writing this particular communication that the sample would be sent directly to the Plastic Process Company? A. That is correct.

Q. I think you previously testified that it was not given to you?

A. It definitely was not given to me.

Q. Now I direct your attention to the middle portion of this communication of May 3rd and to what appears to be a sketch that was made by hand in the middle of the context. Did you have anything to do with the making of that sketch?

A. I would have drawn that sketch.

Q. Does it appear on the copy that you hold?

A. Yes, it does.

Q. By the way, what is that copy? Is that your office copy?

A. This would be my office copy, yes.

Q. And is there any reference to the dimensioning of the device that was sketched by you in the body of the letter?

A. Only in that it calls out that the outside diameter, assumedly, must be approximately three-fourths of an inch or less square.

Q. I see. Now I direct your attention to the third from the last paragraph, to the language reading in part, "Please let [410] me know as soon as you can what you would recommend in addition to quoting on the sample." Was it your understanding in the conversation with Mr. Grindle that recommendations were to be made concerning the pos-

(Testimony of C. Martin Welch.)

sibility of constructing the device that he exhibited to you by the print on April 28, 1948's drawing?

A. I can only give you an assumption, Mr. Naylor, that that sentence might well have been prompted by the fact that even at that early stage of my experience in extrusions, I possibly noted that what we were to try and do might not be able to be obtained.

Q. And did you have any——

A. And I might have stated, "What do you recommend?" meaning, "What other alternate design," including the one that I drew on there, "might you suggest to us"?

Q. Now I direct your attention to the next to the last paragraph and to the sentence that reads, "It was mentioned that these people would have no objection to us selling other airlines this fuel gauge, as they are all presently using a metal or wood stick which is unsatisfactory to the extent that the gasoline evaporates so rapidly that an accurate reading is not always obtained." Now what prompted that? Who mentioned this?

A. My only contact with Pan American at the time was through Mr. Grindle, and following that reasoning, it would [411] have to be him that mentioned it.

Q. You had no contact with others in Pan American?

A. Not, certainly not on the occasion of the first visit, and for quite a few visits afterwards.

Q. Now, coming now to the last paragraph of

(Testimony of C. Martin Welch.)

the letter, reference being made to, "We are only to furnish the extrusion, not the paper scale charts or the wood." Was that the understanding that Mr. Grindle imparted to you in this first conversation?

A. That is correct.

Q. And again, there is a reference to something in plastic to replace the wood. Was that intended by you to seek a suggestion from Plastic Process?

A. Yes, I would interpret it as such, Mr. Naylor.

Q. Now, did you receive anything from Plastic Process Company in response to this May 3rd, 1948, letter of yours? A. Yes, I did.

Q. Can you recall approximately how long it was before you had a response to that communication?

A. Because of dates on correspondence, Mr. Naylor, I can recall almost exactly that. It is only because my memory is refreshed by the letter of transmittal of Mr. Kerr's, dated May 11th. Otherwise I would have to say that it might have been a week or two weeks or a month.

Q. I show you now a communication which is dated May 10, [412] 1948, and will ask you if you can identify that?

A. Yes, I can identify it.

Q. And is that your office copy of the communication? A. That would be my office copy.

Q. Addressed to whom, Mr. Welch?

A. Addressed to Harry Wenk.

Q. And Harry Wenk is who?

A. He is, was, the vice-president in charge of sales under whom I directly worked.

(Testimony of C. Martin Welch.)

Q. Now I ask you to examine that particular communication and state whether or not it has any reference in it to dipsticks.

A. Only on one line, toward the middle of the page. It states, "Re: Pan American. Where's the dope on the gas dipstick?"

Q. And that is the only reference in that communication, is that correct?

A. That is the only reference.

Mr. Naylor: We will offer that, your Honor, as Defendant's next.

The Court: It may be received and marked.

The Clerk: Defendant's Exhibit M in evidence.

(Whereupon, letter from Welch to Wenk, dated 5/10/48, referred to above, was received in evidence and marked Defendant's Exhibit M.) [413]

Q. (By Mr. Naylor): I show you what has been offered here, Mr. Welch, as Defendant's Exhibit I, and will ask you if you are familiar with that.

A. Yes.

Q. I direct your attention to the fact that the letter contains a statement, " * * * and are returning the results to you today." Do you recall having received such results?

A. Yes, I did definitely receive them.

Q. Can you describe to the Court the form that the results were in?

A. There were four units to the section Mr.

(Testimony of C. Martin Welch.)

Kerr sent up, three pieces of plastic tubing and a wood filler spacing bar.

Q. And was that all? A. Assembled.

Q. Excuse me. All assembled?

A. Assembled into what was to represent and was intended to represent a dipstick.

Q. Now I would like to ask you specifically if that assembled device was accompanied by anything else in the way of physical pieces of a dipstick?

A. No, there were only four parts to it and I have identified them as three pieces of tubing and a wood core or filler.

Q. And they were assembled as you received it?

A. Assembled as I received it.

Q. Now what was your practice in communicating back and [414] forth between Plastic Process and your office with respect to samples? Do you know how this sample would have come?

A. Today, and to the very best of my recollection, from the very first day I started with Plastic Process Company, all correspondence and all samples, with the possible exception maybe of bills to me for material which the girls might not have wanted to send out, airmail. All correspondence and all samples between us went back and forth airmail—still do to this very day.

Q. Is it your belief, because of that, that this sample from Mr. Kerr came by airmail to you?

A. Well, I more strongly believe it also because I was in quite a hurry for the part, and I think I

(Testimony of C. Martin Welch.)

can recall requesting either by phone, and definitely by my letter of May the 10th, that I was awaiting this information.

Q. Now I direct your attention to the concluding sentence of the first paragraph of this May 11, 1948, communication, Defendant's Exhibit I, to the statement about butyrate. Will you read that, please?

A. "Also, butyrate is better than lucite for aromatic hydrocarbons, according to authority."

Q. And what does that mean to you?

A. Well, very simply that Mr. Kerr substituted cellulose acetate butyrate for the tubing he sent up in preference to the, very apparently, lucite section he received. [415]

Q. In that connection, Mr. Welch, I would like to direct your attention to Defendant's Exhibit F, which again is the print, and will ask if there is any reference to the material of which that was proposed to be extruded.

A. In two places on the print, Mr. Naylor, and the title block of the print; it calls out, "Extrusion—three-quarter inch square lucite." And in the body of the print on a note it says, "Extruded in clear lucite plastic or equivalent."

Q. Then in that connection do you interpret Mr. Kerr's reference to butyrate in the May 11th communication to you as his suggestion of a better material?

A. Most definitely.

Q. Now coming back to the results that Mr. Kerr referred to in this communication, I would

(Testimony of C. Martin Welch.)

appreciate it if you would examine Defendant's Exhibit H for identification and state whether or not that corresponds exactly or substantially or in any way to the assembly that you received from Mr. Kerr.

A. Substantially, I would say; with the exception that to my recollection, the wood bar, perhaps, was not as dimensionally made as this one that my neighbor and I made several weeks ago. We took quite a bit of time in fabricating this sample, so we'd have even sides on all four surfaces for calibration scales, and a good fit.

Q. Do I understand from that, then, that dimensionally the [416] wood spacer that was prepared and sent by Mr. Kerr was not exactly like the wood spacer that you observe in Defendant's Exhibit H for identification?

A. It was very close to it, Mr. Naylor, with perhaps—without thought again by Mr. Kerr in sawing it out, of creating four equal surfaces of exactly the same dimensions.

Q. Now what significance, if any, does the idea of four equal surfaces have to you?

A. Well, mainly that if you were to wrap paper around there, paper charts that were scaled out with calibration figures on them, you would require the widest surface possible to obtain in order to give the largest possible size numbers, to print on there the largest possible size numbers; and also because of bending the paper around the wood, each of two sides particularly would have to be

(Testimony of C. Martin Welch.)

identical, because you would have irregularity in laying your paper on if they were not. So that your imprint on the paper may fall in a groove on one side.

Q. Is it your recollection that the Kerr sample then had not been so carefully dimensioned with respect to the providing of four equal surfaces on the wood itself?

A. That's right, I don't believe Mr. Kerr was interested in exactly what the dimensions were on the wood. He wanted to position the tube so that you could get two readings off of each single [417] tube.

Q. Now did the assembly correspond to Defendant's Exhibit H for identification with respect to the two inner tubes and the wood spacer being cut flush with one end of the outer tube as you see it?

A. Yes, I am sure it did.

Q. And what was the characteristic of the other end?

A. The extension of the quarter-inch tubes approximately one-eighth to one-quarter inch above the flushness of the wood and square outer plastic tubing.

Q. Now would you tell us whether the device sent by Mr. Kerr had any attempt made at sealing the ends of the structure in any way?

A. I am so positively sure it did not.

Q. Now upon receipt of this particular sample from Mr. Kerr, what did you do next in the sequence of attempting to produce a satisfactory dipstick?

(Testimony of C. Martin Welch.)

A. Following that we—I say we, including my neighbor, who had the tooling shop to rout out wood and so forth, to saw-cut wood—he had a table saw, mainly, plus other equipment that would be of help, and when we arrived at a satisfactory piece of wood, I can recall marking it with pencil markings to indicate graduation scale positions for particular numbers on the sides of it.

Q. You mentioned your neighbor. Who is your neighbor? A. Louis Klein. [418]

Q. And is he actually a neighbor in the sense of living close by you at Millbrae?

A. The next house from me.

Q. The next house. Who is Mr. Klein? I mean, what does he do?

A. His present capacity is, I believe, business manager for the public school system in Millbrae.

Q. And had you known him very long?

A. Since I moved next door to him in 1947.

Q. Have you known him ever since? Have you lived next door to him ever since? A. Yes.

Q. Have you ever had occasion to observe Mr. Klein in his shop?

A. Quite frequently since 1947. I even used to run his lathe to pick up a few pennies at that time.

Q. And did you ever observe anything under construction in Mr. Klein's shop?

A. Over a period of time, quite a number of things under construction, yes.

Q. Without going into detail, would you mention a few of them?

(Testimony of C. Martin Welch.)

A. Castings that I speak of that I helped machine on the lathe, for a neon cathode housing, I believe. He's been quite prominently known for his ability to produce a particularly [419] flexible chair for spastic children. He is quite a design engineer. He has been called on quite a number of times to make display equipment for the Sacramento Fair, and he had reviewed to me some time or another during our association that he had made quite a bit of display equipment for the Treasure Island Fair. Quite a design engineer in his own right.

Q. And you have been in his shop?

A. Yes.

Q. And you have worked in his shop?

A. Quite frequently, yes.

Q. Now precisely what were you seeking after receiving the sample from Mr. Kerr in going to Mr. Louis Klein?

A. To supply a sample to Pan American in final form, but for the calibrations, which I at that time had no way of knowing just dimensionally what they might be.

Q. And did Mr. Klein perform any operation at all in your behalf with respect to the assembly of what you believed to be a satisfactory dipstick?

A. He assisted me in running out a number of pieces of wood until we got a satisfactory section. I might clarify that to the best of my recollection, that he actually ran the saw.

Q. You say he actually ran the saw?

(Testimony of C. Martin Welch.)

A. He actually ran the saw. [420]

Q. Mr. Welch, I show you still another dipstick assembly, which was marked as an exhibit on, I think, your deposition, or Mr. Grindle's, I forget which, and I will ask you if that corresponds in any respect to the assembly that you made up as a result of the help given you by Mr. Klein.

A. Well, I recall the sample as being some parts I picked up in my workshop when Mr. Klein's saw wasn't available on a particular day, to show an approximation of what I had delivered, and I took no trouble to flush out the ends. The piece of wood I picked out is one similar to the one we presently use, and I would have it in stock. It is radiused, and also the tubes are cemented into the ends of the tube, indicating it is just a spare piece of tubing I had already present in the shop.

Q. I see.

A. So it is different in those respects.

Q. In those respects?

A. And also the tubing sticks out at either end to indicate this particular tube was used for a ten tank dipstick, and found lying in my workshop. Undoubtedly it was from a ten tank dipstick, because it is not trimmed flush. It would be put in to the inserted—(indicating)—

Q. It is an illustrative assembly? A. Yes.

Q. Now I direct your attention to the fact that certain [421] pencilled markings appear on the wood filler. What does that signify to you?

A. Well, they were an effort on my part to

(Testimony of C. Martin Welch.)

recreate what I had imprinted on the initial sample I took over to Mr. Grindle, just to show, as I stated before, little lines I put on there.

Q. Now I direct your attention again to Defendant's Exhibit H for identification and will ask you to note especially the cross-sectional characteristics of the wood spacer included in that assembly. What is the nature of the cuts that were made in that particular filler to accommodate the smaller inside tubes?

A. They are square cuts, the type only of which—I don't know how you would obtain much else on a table saw. They are square cut, right angled cuts, I would call them.

Q. They are right angle cuts?

A. Right angle cuts made in adjacent corners.

Q. And was that——

A. Opposite corners, I should say.

Q. Was that the product of Mr. Klein's assistance with his table saw?

A. Yes, we, I think at that time, tried to leave a little more body in there, but—at least I am positive, some on the body. We didn't bother with the sample we took over to Pan American. It was a concern to us to build up that cross-section, [422] if we could. It was also a concern to us to give as much surface on the four sides.

Q. Did you actually discuss with Mr. Klein at that time the matter of building up the cross-sectional aspect of the wood filler?

(Testimony of C. Martin Welch.)

A. Yes, he recommended leaving a little bead in there at that particular time, I believe.

Q. And was any attempt made to cut such a piece of stock?

A. Yes, he cut various pieces, I believe, at that time, like it. I can't be positive about that. I know that some time or another, possibly after that, we tried cutting it. Maybe it was at that particular time.

Q. Now I would like to ask you specifically whether in this conversation—and I am speaking of the conversation with Mr. Klein that followed receipt by you of the Kerr assembly—did Mr. Klein make any suggestions as to alternative methods of cutting the cross-sectional aspect of the wood?

A. Not at that time he didn't. Later on it was at his suggestion that we radiused the wood, but that was some time afterwards.

Q. By "some time," what do you mean?

A. Well, I can't place it.

Q. Would you say days or weeks or what?

A. I think weeks or—I believe that the next problem that [423] I took over to Mr. Klein was after I got the purchase order or at least indication of the purchase order, if not the actual purchase order.

Q. And this—

A. Could have been, I would say, any time after June the 10th, 1948. He suggested to me that we could lick this whole thing, giving ourselves a

(Testimony of C. Martin Welch.)

thicker cross-section in the center plus a widest possible surface on which to lay the imprinted charts, by routing out the wood.

Q. And did you follow through on that suggestion? If so, just tell the Court briefly what you did.

A. Well, immediately after getting the purchase order, I went to a particular mill that he recommended to do that work.

Q. The name of the mill, please?

A. Fink & Schindler is the first place he sent me to.

Q. And were they able to satisfy your demands?

A. Well, no, they weren't interested in the small quantity I required; I only wanted a thousand feet, I think, of the wood, and they referred me to another place, the Schafer's Mill, which is nearby—I believe on the same street, as a matter of fact a few doors down. It is a much smaller mill.

Q. And were Schafer's able to produce a radius cut wood spacer?

A. Yes, they made the wood for me for some little period of time, and I received delivery of the first parts, I know, in [424] July.

Q. I show you now a short section of wood and will ask if you can identify that for the Court, please.

A. This is an exact pattern of the wood we presently use and have used since receiving the first order in the early part of July, 1948.

Q. And what specifically is the difference between the cross-sectional characteristics of the

(Testimony of C. Martin Welch.)

small piece I have handed you and the piece in the assembly, Plaintiff's Exhibit H for identification?

A. The grooves on the opposite corners of the wood are diametrically rounded out to accommodate the dimension of the quarter-inch round tube.

Q. And is that the type of wood spacer that you were seeking when you contacted Schafer's Mills?

A. It's an exact duplicate of what he first produced, yes, and what I was seeking.

Mr. Naylor: We will offer that, your Honor, as Defendant's next in order.

The Court: Let it be received.

The Clerk: Defendant's Exhibit N in evidence.

(Whereupon, wood part referred to above was received in evidence and marked Defendant's Exhibit N.)

Q. (By Mr. Naylor): Mr. Welch, I next direct your attention [425] to Defendant's Exhibit J and will ask if you can identify that, please, stating what it is.

A. That would be my office copy of a letter to Plastic Process Company, Los Angeles.

Q. And the date of it?

A. Dated June the 9th, 1948.

Q. Now is there an indication there concerning the prospect of an order from Pan-American Airways?

A. Very definitely.

Q. And how is it stated in that communication?

A. "P.S. As mentioned to Ted over the phone, am going to make up 100 only dipsticks complete

(Testimony of C. Martin Welch.)

with printed scales and plastic plugs in each end. These people originally asked us to quote on 300 units. However, the engineer informs me now he will only be able to order 100 units. They may take another 100 or so at a later date, however."

Q. Does that signify to you that between the writing of this communication, Defendant's Exhibit J, on June 9, 1948, and your receipt of the assembled Kerr device, that you had seen Mr. Grindle again? A. Yes, definitely, I am sure I did.

Q. In that connection, Mr. Welch, I direct your attention to the communication dated May 14, 1948, and will ask if you can identify that.

A. Yes, this would appear to be an original. I notice my [426] signature, my M on the bottom of it. An original of a letter I sent to Los Angeles, the original letter apparently was taken from their files.

Q. And is there a reference in that communication to any contact with Pan-American relative to the dipstick?

A. In the opening sentence, I believe, is the only reference.

Q. It's very brief; will you please read it so that we will understand it? A. It says:

"Dear Harry:

"Will see Pan-Am. this p.m. on the dipstick. Thank you for the quick service."

Q. And how do you interpret that in relation to what had gone before? What does it signify to you?

A. That I had undoubtedly gone into the office that morning with the completed sample to be taken

(Testimony of C. Martin Welch.)

to Pan-American and was going to go home early and stop by there on the way to present it to them.

Mr. Naylor: We will offer that, your Honor, as Defendant's next in order.

The Court: Let it be received.

The Clerk: Defendant's Exhibit O in evidence.

(Whereupon letter from Welch to Wenk, dated 5/14/48, referred to above, was received in evidence [427] and marked Defendant's Exhibit O.)

Q. (By Mr. Naylor): Now in that connection, Mr. Welch, after you had received the sample from Mr. Kerr and you and Mr. Klein had done to it what you have been describing, when you next saw Mr. Grindle did you give him anything that was intended to be the result of the work that had been done? A. I handed him a completed assembly.

Q. And of what did that assembly consist?

A. Four parts, namely, three-quarter inch square tubing, two three-quarter inch round tubes and a wood core, wood filler.

Q. And had you assembled those before taking the components to Mr. Grindle?

A. Certainly.

Q. Now at that time did you have any square tubing and round tubing?

A. No, no, I did not.

Q. You did not. And do you recall approximately when you called on Mr. Grindle with this assembly that you have been speaking about?

(Testimony of C. Martin Welch.)

A. Recollection would allow me to say it was shortly after receiving the sample, and having done this work in Mr. Klein's shop, but the letter you have just shown me indicates that I saw him on the 14th of May.

Q. Would you take it from Defendant's Exhibit O, dated [428] May 14th, 1948, with the reference that you have just made, that it was within a day or two of that writing?

A. I would say it was that afternoon.

Q. You were anxious for the business, were you?

A. Well, I was pretty broke at the time, Mr. Naylor. We needed all the business we might possibly be able to obtain.

Q. Now did you leave the complete—strike that.

In this assembly that was delivered to Mr. Grindle, there is one further question about it. Will you describe as nearly as you can recollect the cross-sectional characteristics of the wood spacer?

A. Well, I am quite certain on that, Mr. Naylor. It was a piece of wood somewhat under three-quarters of an inch in size with two square-cut right angle cuts in the opposite corners.

Q. In the opposite corners? A. Yes.

Q. Did you leave that assembly with Mr. Grindle at Pan-American?

A. Yes, it was received quite enthusiastically by Mr. Grindle and shown, I believe, to several of the boys in and around his desk in the engineering group, and quite some comment took place that this certainly was what they were searching for.

(Testimony of C. Martin Welch.)

Q. And you say it was enthusiastically received. What were [429] you to do further about it, if anything, at that time?

A. In conversations that followed, I was asked, possibly on this very same visit or during the same visit, if I would make such a dipstick up, that they would try it out, test it for durability. It was most obvious that it would work, it would contain a column of fluid in the tube. They didn't have to test it in that manner. They had only to test it for durability. Those tests were made during the ensuing week or two with this very sample I left, and as a result of those tests I was informed on or about the first part of June by Mr. Grindle that that's what they would like to have me make, and of course would have to have paper charts in it, and as a consequence to having paper charts, it would also have to be plugged. That would be the only reason to plug it, would be to keep gasoline off the inner surface of the paper charts. If you had another manner of imprinting on the wood your calibrations, you wouldn't have to have it plugged. It would be stronger, because it would—and did, the sample I left with them did split on the ends, because there was no adhesive plug on it.

Q. There was no plug on it?

A. No, the tubing split quite badly.

Q. Are you positive when you say that the sample that you delivered to Mr. Grindle did not have plugs in it?

A. Mr. Naylor, I searched for a way to plug

(Testimony of C. Martin Welch.)

those ends for [430] a month and a half at least. It was the main reason and the only reason I was not able to make an August 1st or August, should I say even July 21st, delivery commitment date. I couldn't find a satisfactory method of plugging the ends. The original blueprint I received from Pan-American, which was made up from the sample I left there, stated, "Fill the ends with AN-C-141 cement," which to this day remains an impossibility, a complete impossibility.

Q. Now you are familiar, of course—now I will show you Plaintiff's Exhibit 12, which is the June 10, 1948, letter, and I assume that you are familiar with that, since it was addressed to you?

A. Yes, I am.

Q. Now reference is made, is it not, in the first paragraph to three copies of your drawing No. D32.061.114?

A. It is that. That is the opening line of the letter.

Q. On fuel tank dipstick assembly?

A. Right.

Q. Now is that followed, or not, by reference to a purchase order?

A. "Our purchase order will be issued for 100 units, based upon your quotation dated June 6, 1948."

Q. And then it goes on to relate to future orders, does it not?

A. In that particular paragraph, yes. [431]

Q. Yes, sir. Now in the next paragraph I would

(Testimony of C. Martin Welch.)

like to ask you if there is any reference to the characteristics of the sticks?

A. There certainly is. It states, "We have altered the design of the sticks * * *," and I interpret that to mean the design that I left with them, from the original sample.

Q. And what do you interpret the words, "original sample," to mean in that communication?

A. That sample I left on the 14th of May.

Q. And then specifically the alteration relates to what? What aspect of the stick is that?

A. To incorporate solid plastic sticks in each end for additional strength, because the sample I left on the 14th of May split on the ends—not because I had filled it with anything on the 6th of June.

Q. Now this reference to the three copies of our drawing No. 32.061.114; what is your recollection of what that drawing portrayed?

A. It described or portrayed the various parts, wood filler, tubing, and most important to me and what I require most was the calibration chart.

Q. Now you mentioned wood filler. I should like to ask you specifically what you recall as being the characteristics of the wood filler or spacer, depicted in the drawing that accompanied this June 10, 1948, letter to you? [432]

A. The wood filler did not have radius grooves in it, had square-cut, right angle grooves.

Q. Are you positive of that recollection?

A. Most positive.

(Testimony of C. Martin Welch.)

Q. And did you take it from that that this was a drawing of the sample that you had left?

A. Not only from that. I had other reasons to believe that the D32.061.114 drawing was made principally from the sample I left. The most important one that you could prove, of course, is that that original drawing, contrary to testimony given here by Mr. Chong and Mr. Grindle, did not have radiused corners on it.

Q. That's your most important reason for believing it?

A. Well, you could put it this way. That is the most important way we could prove. I had other reasons to believe that the drawing was made from the sample I left on the 14th of May.

Q. Will you state what those reasons were for such belief?

A. Principally, Mr. Grindle informed me that to purchase the part, he would have to incorporate a drawing along with the purchase order, because it was the sole practice of Pan American when ordering parts such as these to include a drawing so that they would be made to that drawing's specifications.

Q. And that was for what, inspection [433] purposes?

A. Yes, that is probably one of the big reasons. It is their procedure, I am sure, today and always has been, probably.

Q. Mr. Welch, I would like to show you a print of what is identified as drawing No. D32.061.114,

(Testimony of C. Martin Welch.)

and will ask if that is the print as you recall it that accompanied the June 10, 1948, letter from Pan American.

A. This was exactly one of the three copies. I am so positive in saying that, in that this print also I obtained from the files of Plastic Process Company.

Q. You obtained that from the files of Plastic Process Company?

A. 1948 file of Plastic Process.

Q. On what occasion did you so obtain it?

A. In searching for this other drawing. I had misplaced, I guess, the other two copies with it, or maybe I left one with the—Oh, I don't know what I might have done with them. I couldn't locate them, and I found this original in that file. I later determined the reason I found it in the file: It is because of a letter of transmittal after receipt of the purchase order asking Mr. Kerr what in the world AN-C-141 cement was. And I referred to this drawing when I sent it to him.

Q. Mr. Welch, I direct your attention again to the Defendant's Exhibit K, your letter of Mr. Kerr that you [434] previously mentioned, dated June 23, and will ask if that letter contains any reference to the inclosure of a print. If so, would you state how it appears in the letter?

A. Yes. I believe the only reference is to a print. It says on the bottom postscript, "Don't discard this print as while I have another, I may need same to send to other airlines, as it is very likely there is a

(Testimony of C. Martin Welch.)

definite need for a dipstick like this and am going to send samples to all the airlines when I finish this job in the hope of securing orders for more."

Q. And do you interpret that as being a reference to the print that you hold here of the Pan American drawing?

A. I would have had—I had no engineering service or drafting service available to me at the time and I would have sent that print down to Mr. Kerr.

The Court: Will you identify that exhibit a little more?

Mr. Naylor: Yes, I am going to right now, Your Honor. We will offer that as Defendant's next in order.

The Court: Let it be received.

The Clerk: Defendant's Exhibit P in evidence.

(Whereupon blueprint referred to above was received in evidence and marked Defendant's Exhibit P.)

The Witness: I would like to note, Mr. Naylor, I catch in that letter, apparently, further memos that I didn't [435] know how to plug the ends on the 23rd of June.

Q. (By Mr. Naylor): I will come to that, Mr. Welch. In connection with your last observation concerning Defendant's Exhibit K, will you note at what point in the letter there is the reference to the matter of plugging the ends of the stick?

A. In the third paragraph I say: "Ted, have

(Testimony of C. Martin Welch.)

you any recommendations on how I should plug the ends of the square tube?"

Q. And what interpretation do you place on that?

A. The drawing that I received, the one of three copies, the D32 drawing I received, called for this AN-C-141 cement, and I didn't know what that was, and I guess this letter interprets the problems I had in solving the cementing of the ends of the tube.

Q. Now coming back to the drawing, Defendant's Exhibit P—May I take the stick and I will——

A. I have more copies of this drawing if you——

Q. I have them, thanks.

Mr. Naylor: Does Your Honor wish to take the normal 3 o'clock recess? I am just about to start with interrogation concerning this drawing.

The Court: Yes, as long as you are going into a new subject matter.

Mr. Naylor: Yes, it is, Your Honor. [436]

The Court: All right, take the afternoon recess.

(Recess.)

Mr. Naylor: If Your Honor would care to follow this line of examination, I have an extra print.

Q. Mr. Welch, I would like to first direct your attention to the lower right hand corner of this print, D32.061.114, Defendant's Exhibit P, and I will ask if you see any indication of dating thereon?

A. Two separate dates, one June 4, '48, following the name of Art Chong, showing the drawing date, and then the checking date signed by three

(Testimony of C. Martin Welch.)

different people, of June 7, 1948?

Q. And can you read the names of the three persons who checked and approved the drawing on June 7, 1948?

A. E. L. Grindle, what appears definitely to be the name of Smith, I don't know the initials, and what appears to me to be a signature I have seen before, of Harry Kiester's.

Q. Kiester?

A. Kiester, I believe, is the pronunciation. I am not sure.

Q. June 7, 1948.

A. That date follows the signature here.

Q. Now I direct your attention to the lefthand section of the drawing, detail 6, and will ask what is your interpretation of the thing that is depicted there.

The Court: Where is that?

Mr. Naylor: In the middle left section of the drawing, [437] Your Honor, to the extreme left-hand end of the drawing.

The Witness: With your permission, may I show you?

The Court: Yes. Oh, go ahead.

Q. (By Mr. Naylor): All right.

A. That, to me, represents exactly the way the wood was milled out on the initial sample submitted to Pan American, to Mr. Grindle of Pan American, on the 14th of May.

Q. And does that indicate to you a square-cut as distinguished from radius cut?

A. Most definitely is, right angle cut—square cut.

(Testimony of C. Martin Welch.)

Q. Now I direct your attention to detail 2, which is the longer section in the middle of the drawing. Is there any indication of the cross-sectional aspect of the wood spacer?

A. May I make a correction for you, Mr. Naylor? Detail 2, as I read the blueprint, represents——

Q. I am sorry, I missed my——

A. ——the assembly is what you have reference to.

Q. I will stand corrected, Mr. Welch. It is the assembly.

A. Then answering your question—I don't believe you have to repeat it; you asked me, does that wood detail show a square cut?

Q. Yes.

A. It most definitely shows a square cut.

Q. And to you does that square cut correspond to the detail of detail 6? [438]

A. It's identical.

Q. Now do you see on this drawing any reference to the sealing of the ends of the stick, and if so, will you state where it is?

A. Yes, I do, in two places: on the left center of the drawing, "Seal both ends with AN-C-141 cement, smooth cement flush with -8. Ends must be fuel-tight."

Q. "Ends must be fuel-tight."

A. Right. Below that it says, "-12. Block -end 2 required. Cut-out similar to -6. Cement to -8 with AN-C-141 cement all around.

Q. Do you take it that detail 6 is a detail of an end plug or the wood section or both?

(Testimony of C. Martin Welch.)

A. Detail 6 is definitely intended to be the wood section.

Q. You so understand it?

A. As anyone would read a blueprint, I am certain, that that would be the answer.

Q. And you gather that from the use of the expression "cut-out similar to -6"?

A. Well, the "cut-out similar to -6" would refer to the "block -end 2 required." "-6 definitely refers to a wood filler. It's further noted in the title block of the letter, Mr. Naylor—of the print, rather—that "-6" is filler, and then over on the far side it says, "pine."

Q. And that is carried further in the assembly view, is it [439] not? A. Yes, it is.

Q. There is a reference numeral with a lead line?

A. "Filler 1 required."

Q. I see. Now upon your receipt of Defendant's Exhibit P, I will ask you whether or not you interpreted this drawing as depicting the sample that you have delivered to Mr. Grindle as a result of the work that had been done up to the time of the completion of the assembly that you delivered to him.

A. Not exactly in total, Mr. Naylor. The drawing very definitely gives the information I required in order to make up the graduation charts. That is, basically the calibrations, without which the rest of the assembly is useless—as a finished product to be sold to an airline.

Q. And where does that appear on this particular exhibit, Defendant's Exhibit P?

(Testimony of C. Martin Welch.)

A. Under detail 2 and on the upper left corner—as I should say, above detail -2, is the actual chart calling out for Le-Roy lettering.

Q. And——

A. How long the chart should be and over in the upper left-hand corner are the exact dimensions up from the bottom of the stick the markings would have to appear when it was completely [440] assembled.

Q. You have reference to the graduation chart, do you? A. That's right.

Q. Now in detail 2, is there reference to the characteristics of a part of the calibration chart?

A. Detail 2 essentially shows the length of the chart and its width.

Q. And there is some lettering?

A. That would be the strip that would have to be cemented on the two sides.

Q. There is some lettering indicated, is there not?

A. Numerals—80, 100, 120, 140, 160, 180, to appear thereon; also 20, 40, 60. Additionally the tanks are called out.

Q. In detail 4 is there any indication of how the other calibration charts would be characterized in some respects?

A. To clarify it further, Mr. Naylor, detail 2 covers Nos. 2 and 3 and No. 2 and No. 3 aux.

Q. "Aux," meaning what?

A. Auxiliary tank.

Q. Yes?

(Testimony of C. Martin Welch.)

A. No. 2 and No. 3 main—the tank again. Detail -4 is identical to -2, but for having the configurations that would appear, and also the tank column, number, and as 1 and 4 main, and 1 and 4 aux., and also positions the part number on the chart at a very definite particular place on the Nos. [441] 1 and 4 main side.

Q. Now, subsequent to your receipt—no, excuse me; I withdraw that.

Before I take that up I would like to ask you one question: Were you present when Mr. Chong testified in this case? A. Yes; I was.

Q. And you heard Mr. Chong give his testimony in reference to what was shown by the original vellum of this drawing? A. Yes; I did.

Q. And you heard Mr. Chong testify in reference to the print which he had treated by addition of red lines to denote differences?

A. That is correct; I have it.

Q. You were here? A. I was here.

Q. And I am referring specifically to Plaintiff's exhibit 26, which I hold now and exhibit to you?

A. Yes.

Q. I will ask you if you will examine Mr. Chong's print, Plaintiff's Exhibit 26, and state whether or not the characteristics of the cross-sectional part of the wood spacer or filler correspond in relation to Defendant's Exhibit P which you hold.

A. No; there's a definite difference. [442]

Q. And how do you interpret that difference?

(Testimony of C. Martin Welch.)

A. The right angle cuts on the opposite corners of the wood on Defendant's Exhibit P are very definitely right angle cuts as such—square cuts—and the grooves, shall we say, shown in detail -6 of Plaintiff's Exhibit No. 26 are radiused, indicating that this print, 9/1/48, was simply made to modify it to allow inspection department of Pan American to accept my dipsticks.

And there is a further change.

Q. May I ask you further in reference to the cross-sectional aspect of the wood, will you examine Plaintiff's 26 at the center portion of the drawing, at which point the cross-sectional characteristics of the complete assembly are shown? In what form is the wood filler indicated in that figure?

A. It is very definitely radiused.

Q. And now will you examine again Defendant's Exhibit P and state how that compares as to the cross-sectional aspect of the wood filler?

A. The opposite grooves are very definitely at right angle cuts, square cuts.

Q. Now, how do you interpret that, Mr. Welch, from the standpoint of the original vellum from which these two prints were taken?

A. Well, it's difficult for me to have—to understand [443] even now how Mr. Chong, by holding this print up to the light, was able to pick out only some of the phantom lines and how he missed the erasures, the phantom lines still appearing on this reproduction, which I don't know where it came from. The phantom lines are the original square

(Testimony of C. Martin Welch.)

cuts that appeared on the original vellum, and show a definite erasure in the radius on them.

Q. In Plaintiff's Exhibit 26?

A. Plaintiff's Exhibit 26. The phantom lines still appear showing the square cuts—which vellum would have a tendency to show throughout its life unless it was covered in the identical position with another pencil mark.

Q. And that definitely appears to you where on Plaintiff's Exhibit 26?

A. In detail 26 it is quite apparent that the phantom lines for the square cut that was originally on the vellum are there, and also in the center of the assembly detail, while it's not as easy to pick out, the phantom lines still do appear.

Q. I see. Now, you mentioned that there was another change?

A. Yes; there's quite a decided one, to further show that this print was introduced by the plaintiff as Exhibit No. 26, that it varied in some detail, and that is, on that vellum that Mr. Chong examined by holding it up to the light, he would not be able to pick out phantom lines wherein he had, [444] after his erasure, inserted printed words covering those phantom lines.

Q. Now, will you point that out to us, please?

A. That is on Plaintiff's Exhibit 26, the following: "Fill and seal both ends with cellulose acetate butyrate cement. Smooth cement flush with -8. Ends must be fuel-tight." In other words, the erasure on the vellum he could never pick out, I don't imagine,

(Testimony of C. Martin Welch.)

after having written over it, on the original vellum, of which this is a copy.

Q. You are referring now to Defendant's Exhibit P?

A. Defendant's Exhibit P. It says: "Seal both ends with AN-C141 cement." So then there was the addition of one word, "cellulose," on the first line—or two words. The words, "End sealed," were inserted there. And the AN-C141 cement was taken off of the vellum, I venture to say, on 9/1/48, as indicated by the change in the upper right-hand corner. The AN-C141 was taken off and acetate butyrate cement was inserted, again to conform with the part I supplied. AN-C141 cement has not been demonstrated here in court at all.

Q. It has not been demonstrated?

A. It has not been demonstrated here in the courtroom to date as a sealant for cellulose acetate butyrate. It is not, cannot be used.

Q. Now, on what do you base that [445] statement?

A. I have looked for quite some time for Army-Navy specifications C141, and it has been outdated, but the plaintiff introduced into court three process charts which I read rather thoroughly and determined that AN-C141 cement had to be AN-C specification—that specification had to be the specifications for making cement with an acrylate base monomer, and to clarify for the Court, and the chemistry of plastics that I have studied, I know acrylate base monomer to be nothing but unpoly-

(Testimony of C. Martin Welch.)

merized base acrylic. It is not lucite yet, it is an uncured, unpolymerized lucite material, and would in that state have no bonding or adhesive qualities whatsoever with cellulose acetate butyrate. The two materials are diametrically opposed to each other.

Q. Are they compatible in the sense of cementing or bonding?

A. Absolutely not. There is no way anyone can demonstrate to this Court a bond using an acrylate base monomer as an adhesive, because it is not an adhesive. What was demonstrated here in court, the application at this time, was simply the bonding of two surfaces with ethylene chloride, which again is called out in AN-C spec 141, and is a solvent for a number of plastic materials. But it is almost singularly and almost completely used today, and was in 1948, as an adhesive agent for acrylic material, not cellulose acetate butyrate.

Q. Now, give us some examples of acrylic material. [446]

A. There can be only two by trade name. They are known as lucite and plexiglass. It is methyl methacrylate, but by trade name it is known as lucite and plexiglass. There are only two companies that manufacture it—DuPont and Rhom & Haas.

Q. Rhom & Haas? A. Rhom & Haas.

Q. R-h-o-m and then H-a-a-s?

A. Right. And DuPont Company in Wilmington, Delaware. A very widely used product for a cementing agent, recognized as the very best you could find, is methacrylate, but not recognized at all as anything to be used on tenite. A poor bond

(Testimony of C. Martin Welch.)

which must be corrected, one that will initially stand up and one that will fail most definitely within a six months' period of time, or within a six months' period of time or approximately that.

Q. And the evidence of failure would be what?

A. Well, it has been tried by us in the plastic field, and one of the most recent applications was on window seals that were made out of cellulose acetate butyrate, and because the fellow who used them had a limited knowledge of what solvent to use, he probably referred—could have referred to a plastic identification chart wherein it states that one of the solvents for cellulose acetate butyrate is ethylene dichloride, and from that had gone [447] ahead on his own. But those materials failed in exactly, or within a few days of a six-month period. There is a definite crazing action develops and the bond disintegrates.

Q. The bond disintegrates?

A. Yes; it did in this case and it would be known to people who are quite conversant in the plastic field. It would happen not only in this case but in continuous cases so long as they formulate cellulose acetate butyrate as a material.

Q. Now you mentioned it would have a tendency to craze. What is your definition of crazing?

A. Crazing is minor cracks appearing on inner surfaces of plastics.

Q. Would such crazing in your belief affect a hermetic seal?

(Testimony of C. Martin Welch.)

A. It is the beginning of complete disintegration of the seal.

Q. And you would anticipate that that would take place in approximately six months, from your own experience?

A. From my own experience and through proven tests that we can point to, it is just about—well, it is an eight-month period now since, and it is rather fresh in mind, when the fellow by mistake or possibly because he referred to some chart that said it is a solvent for it, used it and found it failed in six months. [448]

Q. Yes. Now, coming back to Plaintiff's Exhibit 26, with particular reference to the statement on the drawing, "Fill and seal both ends with cellulose acetate butyrate cement. Smooth cement flush with -8. Ends must be fuel-tight." Insofar as cellulose acetate butyrate cement was substituted for the original government specification, do you interpret that as reflecting the work that you had done?

A. Well, that's another change.

Q. Introducing the sample?

A. Yes, I do. It is another change from the blueprint in order to be accepted by the inspectors. The print should conform with the part delivered and vice versa or the inspectors, I would imagine, are not allowed to receive it.

Q. Now, following your receipt of the June 10, 1948, communication from Pan Am and the print here identified as Defendant's Exhibit P, did you

(Testimony of C. Martin Welch.)

receive a purchase order from Pan American for the dipsticks or a quantity of them?

A. Following that receipt of that, I did, yes. It was on or about the 24th or '5th of June that the purchase order came in. The date, I am quick to say, is established by correspondence. I would have no way of remembering it otherwise.

Q. I show you what has been offered here as Plaintiff's Exhibit 2 for identification—I beg your pardon, that is a deposition identification. It is Plaintiff's Exhibit 11 [449] on trial. I will ask if you are familiar with that?

A. This appears to be a photostat of the purchase order, the initial purchase order that I received.

Q. Is the quality stated?

A. Calls for 100 each.

Q. And is there an identification of a drawing?

A. Calls for 100 each, gives a class number and then it gives a part number, 32- or point, rather, 061.114.

Q. And do you identify that drawing according to your present recollection as being Defendant's Exhibit P, namely, one of the prints?

A. It is extremely unlikely that I received this purchase order without also receiving a duplicate copy of the drawing I was given or that was sent to me on June 10th. It is possible they may have just sent the purchase order, but normal procedures on an airline, particularly on initial procurement,

(Testimony of C. Martin Welch.)

would be to attach this purchase order to a drawing or attach a drawing to this purchase order.

Q. That's for identification, is it?

A. That's quite common procedure in the business I have had for eight years with the airline business.

Q. Now, does Plaintiff's Exhibit 11, which you hold, indicate when delivery was expected?

A. "Delivery, one month," which would indicate that I was supposed to have produced the parts for Pan American on or [450] before July 21, 1948.

Q. And upon receipt of that purchase order, what did you first do, as you recall it?

A. This purchase order would have given me authority to know that I could sell parts that I would have to order to make it. So I am sure that I would have initially ordered the tubing required to make it up and the wood required to make it up.

Q. Now, with respect to, let us take the wood first, had you done anything toward finding an available source of wood fillers of the characteristics that you wanted prior to receipt of the purchase order?

A. Yes; we had. Mr. Klein, in having the first samples on his saw, making the first sample cuts on his saw—we found that cross-section to be somewhat lame, shall we say—certainly not strong enough to support battering around. And I have no record on which to establish a date, so I can only say sincerely that some time, could have been a day after I went over to Pan American with the sample, certainly some time between that period and, let's

(Testimony of C. Martin Welch.)

say, the initiation or receipt of the purchase order, a discussion took place with Mr. Klein and myself on this wood piece, and it was at his suggestion that we seek a mill to give us radiused wood, which we did on or about the 24th, 25th, 26th or 27th of June—some later day. [451]

Q. I see. And——

A. When we were talking about this, the reasons for ordering the wood, he recommended Fink & Schindler to me, because he had been doing work or had obtained patterns of their work from them or something. He was aware of their milling facilities.

Q. Now, is Fink & Schindler in existence today, according to your understanding?

A. I believe they still are in existence today. I have had no occasion to go to them after that initial visit, because they were not interested in the quantity I wanted.

Q. And you said before——

A. I believe that I have driven some time in the last, say, year or so—driven down that particular street that they may be located on. It is Bryant or Brannan, I am reasonably sure, not too far from Third and Townsend, and I have seen the name Fink & Schindler.

Q. Now, you said before that Fink & Schindler referred you to Schafer's Mill?

A. That's correct.

Q. Did you then go to Schafer's Mill?

A. Immediately, that same morning that I contacted Fink & Schindler. But Schafer's Mill was

(Testimony of C. Martin Welch.)

just a couple of doors, as I recall, down the street or through the alley or across, in the very close proximity to the Fink & Schindler address. [452]

Q. I show you at this time what purports to be a statement from Schafer's Mill dated July 26, 1948, and will ask you if you can identify that?

A. I recognize my own handwriting on this and can identify it, yes.

Q. And your own handwriting signifies what, in this instance?

A. Paid on August the 5th, 1948, by check No. 271.

Q. And to whom is this bill addressed, Mr. Welch?

A. Plastic Process Company, Inc., at the address of my office at the date.

Q. And what items does it cover?

A. 500 lineal 1 by 1 to pattern, which would indicate 500 lineal feet of wood to a particular pattern.

Q. And do you recall what the pattern was?

A. Yes, I do; very vividly. It is the present pattern we are using and which was introduced as an exhibit in the court, the square wood with opposite corners rounded out in a grooved manner.

Q. Can you state of your own recollection that it was a pattern that called for a piece of wood with a cut corresponding to Defendant's Exhibit N?

A. It was exactly identical to Defendant's Exhibit N, but I definitely recall that it was manufactured out of another material, I believe either

(Testimony of C. Martin Welch.)

Port Orford cedar or pine. I [453] believe that might be ash there. You would have to examine it more closely. That looks like ash. For the quality of wood, it is identical.

Q. Except for the difference in wood?

A. Right.

Q. A possible difference in wood.

Mr. Naylor: Now, I will offer that Schafer's bill as Defendant's next in order, your Honor.

The Court: Let it be received.

The Clerk: Defendant's Exhibit Q.

(Whereupon, invoice from Schafer's Mill, referred to above, was received in evidence and marked Defendant's Exhibit Q.)

Q. (By Mr. Naylor): I next show you what appears to be a receipt of some kind dated July 26, 1948, and will ask you to identify it if you can?

A. Yes; I can identify this as a bill from the Butler's Special Delivery Service. It would indicate that they picked up from Schafer's Mill at 734 Bryant Street, and it says, "C. L. Schafer." He was the fellow I was dealing with at that time. And "Deliver to the Independent Press Room. See Frank Burke," at 300 Broadway, it is.

Q. Do you have any knowledge of your own as to what Butler's Special Delivery was picking up on that date?

A. It was the wood I ordered at Schafer's before. [454]

Q. And can you tell us why Butler's Special

(Testimony of C. Martin Welch.)

Delivery Messenger Service would be picking up the wood at Schafer's Mill?

A. Because I didn't have an automobile at the time.

Q. And——

A. I had no way of getting it over there to Independent Press Room.

Q. And for what purpose were they delivering it to Independent Press Room?

A. Frank Burke, who printed the initial charts for us that were used on the initial order only, felt that the girl in his bindery would be more adept at cementing the paper onto the wood for me, so he offered to do that for a charge, for a nominal fee, to cement the paper charts that he had printed, which were $35\frac{1}{2}$ or $35\frac{5}{8}$ inches long—I think they were $35\frac{5}{8}$ inches long. They are quite cumbersome to put on, as I recall. I watched the girls doing the first assembly, and we were trying several adhesives to use, and I delivered one of the adhesives to his bindery and observed the girls assembling the paper on the wood.

Q. And that was the purpose of Butler's pickup?

A. That's correct.

Mr. Naylor: We will offer that as Defendant's next in order.

The Court: So ordered. [455]

The Clerk: Defendant's Exhibit R in evidence.

(Whereupon, receipt from Butler's Special Delivery and Messenger Service, referred to

(Testimony of C. Martin Welch.)

above, was received in evidence and marked Defendant's Exhibit R.)

Q. (By Mr. Naylor): Now, aside from the inquiry as to procuring the wood from which to fill the Pan American order, you mention that you ordered the tubing. I will show you what has been marked here as Defendant's Exhibits K and L for identification and will ask you, Mr. Welch, if you can tell the Court what those documents are.

A. These copies, dated June 23rd, the one is a—my copy, my file copy of a letter to Ted Kerr and Harry Wenk, and it states, "I enclose my order for tubing for the job," for the particular Pan American dipsticks.

Q. And is the other document a copy of the actual order, Mr. Welch?

A. This I recognize again as being one of the pieces of paper I picked up in 1953, I believe, when I went to Los Angeles to search for the drawing that had caused so much confusion with Mr.—with Pan American.

Q. Does that account for your possession of the original of the order? A. That's correct.

Q. As distinguished from the file copy? [456]

A. That's correct.

Q. Do you have a file copy of it?

A. I am not sure whether I do have. Possibly if I did have, I turned it over to you.

Q. In any event, you can identify that as the original? A. This is the original order.

(Testimony of C. Martin Welch.)

Q. I note that——

A. I recognize one item on here that indicates further I was in pretty bad financial circumstances at the time—under “terms” here, I say, “Special house account,” and then I go through the normal finger punches of the typewriter, the numeral signs, the dollar sign, and stars and so forth, to indicate to my people in Los Angeles undoubtedly that I wouldn’t be able to pay for it very soon.

Q. Now, those documents are dated when?

A. They are dated June 23.

Q. I call your attention to the fact——

A. With no year on them.

Q. ——that there is no year date on it. Can you fix it as to a year?

A. It would definitely be, they were filed in the 1948 files along with the drawings that were dated, and, I guess, I wasn’t too good a stenographer at the time.

Q. Did you type those yourself?

A. Yes; I did all my own typing until well into 1952. [457]

Mr. Naylor: We will offer those as Defendant’s K and L, your Honor.

The Court: So ordered.

Mr. Naylor: They having previously been marked for identification.

The Clerk: Defendant’s K and L in evidence.

(Whereupon, Defendant’s Exhibits K and L for identification only were received in evidence.)

(Testimony of C. Martin Welch.)

Q. (By Mr. Naylor): Now, I direct your attention specifically to Defendant's Exhibit L as to the quantities stated, and I note that 115 pieces of one type of tubing was specified, is that correct?

A. That's correct.

Q. And how many pieces of the other?

A. 230 pieces of the round, smaller one-quarter.

Q. And is this the tubing that was ordered by you for the special purpose of filling the Pan American order?

A. It represents an additional quantity over what I was required to supply to Pan American. I can recall that I did want some extra pieces for samples to send to possibly other airlines for sale.

Q. Does that account for the odd figure?

A. That's correct.

Q. I show you now, Mr. Welch, what purports to be another communication from you to Mr. Wenk and will ask if you can [458] identify that?

A. This would represent itself as my office copy of the letter I wrote to Mr. Wenk.

Q. And will you examine that and in the interests of time I direct your attention to the last paragraph and state whether or not there is any reference to the order that you had placed for tubing?

A. Yes, there is. Would you like me to read it?

Q. I am merely interested in the significance of the reference there. What was the purpose of that reference?

A. That I—that Pan American was requesting

(Testimony of C. Martin Welch.)

delivery by July 21st and asking them when I could expect—could I expect the tubing, receipt of the tubing in time to fabricate it into the dipstick.

Mr. Naylor: I see. Thank you. We will offer that for its sequential value as next in order, your Honor.

The Court: All right, let it be received.

The Clerk: Defendant's Exhibit S in evidence.

(Whereupon, letter from Welch to Wenk, dated 6/23, referred to above, was received in evidence and marked Defendant's Exhibit S.)

Q. (By Mr. Naylor): I show you next a communication dated June 28, 1948, which purports to be a letter addressed to you, and will ask if you can identify that?

A. Yes; this would be taken from my files and is a letter [459] from Los Angeles, the secretary of Plastic Process Company.

Q. And signed by whom? A. "Joan."

Q. Is she one of the secretaries?

A. She was for quite a few years around that period.

Q. And is there a reference in this particular communication to any communication that had been written by you and in the interest of time, I suggest that you— A. Yes.

Q. —see the top of the letter.

A. Says: "Subject: Your letters, June 23 and 25th."

Q. And this communication—

(Testimony of C. Martin Welch.)

A. Under the subject bracket.

Q. And this communication is dated what?

A. June 28.

Q. What year? A. 1948.

Q. And does this contain a reference to the dipstick?

A. Yes; it does. It says: "Re: Pan American Dipstick." And then it says, "This order will be shipped this week." Want me to continue?

Q. No; that's all right; that's enough.

Mr. Naylor: We will offer that as next, your Honor, Defendant's next.

The Court: Let it be received. [460]

The Clerk: Defendant's Exhibit T in evidence.

(Whereupon, letter from Plastic Process Company to Welch, dated 6/28/48, referred to above, was received in evidence and marked Defendant's Exhibit T.) [461]

* * *

Wednesday, February 29, 1956

C. MARTIN WELCH

resumed the stand.

Direct Examination
(Continued)

By Mr. Naylor:

Q. I show you Plaintiff's Exhibit 10 and will ask if you are familiar with that, sir?

A. Yes, sir.

(Testimony of C. Martin Welch.)

Q. What is that?

A. That is a quotation written or typewritten by me with my signature on it, dated June 7, 1948, addressed to Pan American Engineering Department, attention Mr. Grindle, for 300 dipsticks complete per sample submitted but with printed scale, \$3.00 each.

Q. To what sample was reference being made in that document?

A. Most definitely to the only sample I ever furnished Pan American prior to the delivery of the first parts, the sample that I delivered to them on the 14th—approximately the 14th of May of 1948.

Q. That is the only sample you submitted?

A. That is the only one I could make at least until July; I had only one set of tubing sent up to me from Los Angeles.

Q. What interpretation do you place upon the phrase, "But with printed scale"?

A. The sample submitted did not have a printed scale on it; it was just the wood core and the two pieces of one-quarter [462] inch round tubing in one piece of three-quarters inch square tubing.

Q. This had reference then to a supplement to the sample you had submitted?

A. "But with printed scale"—I knew one had to go on there, on the order, the particular calibrations for which were furnished me on the 10th of June.

Q. I show you again Defendant's Exhibit P and

(Testimony of C. Martin Welch.)

directing your attention again specifically to the characteristic of the wood filler which I think you identified yesterday as being square to accommodate the tubes——

A. That is correct.

Q. Did you ever make a drawing which was actually in accordance with the disclosure on that print insofar as the characteristic of the wood was concerned?

A. I caused one to be made; I didn't make one myself.

Q. You did? A. Yes.

Q. When?

A. Some time after we had made the original assembly on May the 12th or 13th and delivered it on the 14th to Pan American and prior to a decision that was reached by us to go into radiused wood, which I can only calculate as being somewhere in early June because the wood was ordered with the radius on it in late June. [463]

Q. In late June? A. Yes.

Q. That was from Shafer's Mill?

A. That would be wood ordered from Shafer's Mills, the invoice for which we produced.

Q. Yesterday we were speaking of the Pan American order for 100 dipsticks. What were the characteristics of the wood employed in that order?

A. Advice of that order was received in the June 10th letter but that order wasn't received until the 23rd of June, but square cut wood was specified on the drawings that were attached to the letter of June 10th.

(Testimony of C. Martin Welch.)

Q. And in filling that order, did you use the Shafer Mill radius cut wood?

A. Most definitely.

Q. I would now like you to tell us about the makeup of the dipsticks in filling the initial Pan American order for 100. Will you start with a description of the characteristics of the stick?

A. I received the wood from Shafer's Mill in latter July and sent it over to the Independent Press Room, San Francisco, their bindery, so that the women employed there could cement the paper on the wood. The hundred odd parts involved were delivered to my home by Mr. Burke, who is one of the partners in the Independent Press Room, approximately the first part of [464] August. I then assembled the wood cores with the paper charts cemented on them into the plastic tubing, and having spent the better part of July and the first several days into August trying to perfect a method of sealing the ends, we finally settled on a cellulose acetate butyrate—I should say I finally settled on cellulose acetate butyrate cement. And I would judge from correspondence that has refreshed my memory as to the dates, on or about the 8th or 9th or 10th of August we completed our initial parts. I do not recall this as being true at all, because I still like to feel that I didn't complete the parts until the 21st, 22nd or 23rd of August, but receiving records at Pan American that were produced by the plaintiff show delivery of 54 such parts. At any rate, I remember a good deal of trouble in distor-

(Testimony of C. Martin Welch.)

tion of the ends of the dipsticks because I was filling them with a mass bulk type of cement, and when the solvent contained therein would evaporate out, the bulk factor would reduce as much as four and five to one, leaving a big shadow.

So I would refill these shadow ends, and as I would refill them and the cement solvent would escape from the cement I was using, it would draw more tightly in towards the center to opposite corners of the dipstick so that the first parts I delivered were considerably distorted on the [465] ends.

Q. I would like to show you what was originally marked as Defendant's Exhibit H on your deposition and offered here as Plaintiff's Exhibit 18, and will ask you if that is a sample of a dipstick with the ends sealed in the manner that you have just been speaking about.

A. I have a very positive reason to believe that this particular stick, Plaintiff's Exhibit 18, is one of an approximate 40 odd sticks that I replaced in latter October or early November of 1948 with sticks with a much more finished looking end. That was an agreement I made with Mr. Grindle when I delivered the first parts on the initial order and they were badly distorted—many worse than this.

Q. Is Plaintiff's Exhibit 18 badly distorted?

A. I would say that today were I to produce an item like that my customers would probably reject it—undoubtedly reject it.

(Testimony of C. Martin Welch.)

Q. And what characteristic of the stick leads you to believe that?

A. The misshapen ends of the dipstick are not a neat, fashionable looking product; probably it was only worth at the time four or five dollars, or three dollars, because it didn't look nearly as well as the finished products we make today.

Q. What about the function of the stick, Plaintiff's Exhibit 18?

A. It could function providing this was one of the group [466] that didn't leak. We were not successful in getting a good bond with this matter either.

Q. You were not? A. No; we were not.

Q. Will you tell us something about the time factor, Mr. Welch, that was involved in attempting to seal the ends in this fashion? How much time did it take?

A. I would say that we applied ourselves quite directly on this one problem, it being the one that took us longest to accomplish. We could get the wood all right, we obtained the tubing and got the paper to put on the wood, but we didn't get them sealed satisfactorily until October or November, 1948. So I would say I worked on this particular problem quite extensively during latter July and early August, and then after processing the order for Pan American for the first hundred sticks during the month of August and after having made final delivery of the 100 sticks on or about the 28th of August, we concentrated on developing—I again

(Testimony of C. Martin Welch.)

—I use the expression “we” rather frequently, but I intend to mean myself—concentrated on developing a more satisfactory manner of sealing these ends.

Q. I take it at the initial delivery some of the sticks were reasonably good or good?

A. They were accepted because they were wanted badly. I would rather say it that way. Seven of them were rejected, [467] and quite oddly, on the rejection slip today appears the words, “Rejected because of the variation in calibration paper scales being placed on the dipstick.”

Q. Was that your understanding at the time?

A. The first rejection I had from Pan American Airways for that reason was long after that time—several years afterwards. The reason for it was that we were—after this initial order—the printing plate was 36 inches long that produced the particular chart that is on this dipstick.

Q. The plate itself was 36 inches long?

A. The plate itself was 36 inches long and it produced on a slip of paper 35, approximately, and a half inches long and we laid it on the wood. The wood was $35\frac{1}{2}$ inches long—or $\frac{5}{8}$ ths inches long, to be exact, the same length as the paper. The paper was laid on the wood starting from the bottom of the wood and working upward to the top. $\frac{3}{16}$ ths openings remained on each end of the dipstick; they were filled with cement so that there could be no error in calibration of the stick on assembly.

(Testimony of C. Martin Welch.)

Later we used a multilith method to print our paper charts.

Q. Multilith? A. Multilith.

Q. That is a lithographic process of some kind?

A. Lithographic process, and because of the limitations of [468] the machine—press—we were only able to produce slips of paper approximately 12 inches long, so we had six slips of paper then to place on one dipstick. So we would start with the first piece of paper from the bottom of the stick and paste it on. If you were not minutely careful in laying the second piece of paper on and you would go a fraction of an inch, let's say, upward with the second strip of paper—let's say an eighth of an inch upward, and then you laid on the third piece of paper and you were another one-eighth of an inch upward in laying this piece of paper on; and on this side as you started up the stick and you laid your first piece of paper exactly flush with the end of the stick, the second piece of paper probably an eighth of an inch downward from where you should put it and the third piece of paper probably an inch downward, then your net result would be a basic calibration where the two pieces of paper up to this particular distance were, the top part of the bottom pieces of paper, the calibrations would be exact; but on both sides of the stick, this side and this side, you would have a downward variance on one and an upward variance on the other in the middle section and the top section.

Q. That posed a problem, did it not?

(Testimony of C. Martin Welch.)

A. Yes; it did that.

Q. Did you eventually correct that problem?

A. We have corrected it since. [469]

Q. How?

A. We very shortly after—you shouldn't say we have corrected it since; we do our best to hold it within tolerances today. Shortly after use of the three pieces of paper, which were giving us trouble in laying them in the right positions, we went to two pieces of paper. We found a large multilith press that would print paper 17 inches long and which we used for that paper.

Q. 17 inches?

A. 17 and a fraction inches long.

Q. So you have a problem now of two pieces of paper?

A. We have only a problem now of two pieces of paper, and we take, and have for quite a few years now, have taken great pains to have imprinted on the lower slips of paper guide marks, so that now our problem is in the people that assemble these pieces of paper and the wood—it gets very tedious during the course of a day and they get lax during the process and they may lay a strip of paper down too far on the guide mark. The result, fortunately, would effect a reading lower than what was actually in the tank by possibly one or two or three gallons were we to use a figure off one-eighth of an inch. I doubt if it would be feasibly possible for anyone to believe that we could get off much more than an eighth of an inch because you would have too big

(Testimony of C. Martin Welch.)

a gap on top of it and you would know you were off. [470] One-eighth of an inch on probably the largest tanks of the airplanes would represent a fraction of a gallon or maybe a gallon at the most in a 700-gallon tank.

Q. I would like to ask you about the length of time that you found it took you to seal one of these sticks with the butyrate cement.

A. Well, we would, or I was required to go back to each and probably three or four times to get enough body to fill up into the ends. The drying period was possibly eight to twelve hours for each application. So the total period spent in making one individual dipstick—of course, I put a little layer of cement in probably 50 or a hundred of them, then I would go back, say, later that evening, and put another layer of cement; probably three or four days to just get cemented one particular end.

Q. Even doing it with that care, you got distortion at the ends; is that correct?

A. Yes. Of course, the more goop or cement you would put in at one time the quicker the distortion and greater the distortion. So we actually put thin layers in.

Q. Did you consult with any people in the plastics business concerning this sealing aspect of the matter?

A. Quite a few of the supposed experts around town—Ferdinand Kebely of K-Plastix, remembers well the conversations with me, my coming to him with this problem. He doesn't [471] remember the

(Testimony of C. Martin Welch.)

date. Lou West, one of the vice-presidents of Wilson and George Meyer & Company, who is recognized around the Bay Area as quite a plastics expert, remembers well my coming—remembers furnishing me with cellulose acetate butyrate sheet stock for my first plugs that I started to laminate, along about September or October of 1948. Mr. Rollins was in on the initial phase of the problem and has testified here. And possibly one or two others.

Q. What about Plastics Process Company? Did you seek their assistance in the solution of the problem?

A. I asked Mr. Kerr, but I don't recall of ever been given or receiving from him any advice that I used, if any at all.

Q. And did Mr. Wenk make any suggestions?

A. Not that I recall.

Q. When was it that you came upon the idea of using lamination?

A. It would possibly be in September of 1948 to delivery of the first parts to Pan American. It certainly couldn't have been before; it would have to be after.

Q. Will you tell us something about how you got under way with the lamination type of seal?

A. It is difficult for me to remember just at what point we actually started making plugs. I know that upon receiving, approximately in September or early October—likely in latter September of 1948—upon receipt of this sheet material [472]

(Testimony of C. Martin Welch.)

from Mr. West of Wilson and George Meyer Company, I caused to be made a steel rule die the shape of the outline of the wood and current shape of the plugs we are using today. With this steel rule die which was run on a roll-type press—actually, it was a rubber stamp manufacturer that cut out the first initial plugs out of this sheet stock for me, down on Washington Street, as I recall—then we made this steel rule die and we cut out several hundred plugs and we tried those and they worked.

So the next step was to cause to be made a punch press die.

Q. Of what stock or material were you cutting these plugs?

A. Cellulose acetate butyrate stock.

Q. And on the order of that thickness were the original trial plugs cut?

A. They were approximately 20 to 30 thousandths, as I recall; somewhere in between 15 and 30 thousandths—very thin.

Q. Mr. Welch, I show you at this time what purports to be a plastic plug of some sort and will ask you if you can describe that?

A. This appears to be one of the initial plugs we stamped out of sheet stock approximately 20 thousandths thick.

Q. And was that plug actually tried in the sealing of a stick, or that type of plug? [473]

A. This type of plug was attempted and——

Q. With what results?

A. Satisfactory to a point.

Q. And what do you mean by that?

(Testimony of C. Martin Welch.)

A. Well, we determined that we could double or even triple the thickness of these—double the thickness, I would say, and succeed with possibly three to four laminations in the end of each plug and have as good a seal as with eight laminations.

Mr. Naylor: We will offer that little sample as defendant's next exhibit.

The Court: So ordered.

The Clerk: Defendant's Exhibit U in evidence.

(Whereupon, sample referred to above was received in evidence and marked Defendant's Exhibit U.)

Q. (By Mr. Naylor): I show you another plastic plug sample and ask you if you can identify that?

A. This appears to be of the thickness we are presently using today.

Q. I notice this one happens to be transparent. Do you use any colored plugs?

A. We have no particular reason for using transparent plugs; they could be any particular color so long as the material was cellulose acetate butyrate. [474]

Q. In that connection I will show you one that appears to be colored and I will ask you if you are familiar with that?

A. Yes; this is a plug we used several years ago, or had run several years ago out of rather thick material, and it didn't prove too satisfactory.

(Testimony of C. Martin Welch.)

Q. It did not prove too satisfactory. The clear one is typical of your typical vintage plug?

A. That is right.

Mr. Naylor: We will offer the transparent one as the defendant's next, your Honor.

The Court: Let it be received.

Mr. Naylor: And a colored one as defendant's next in order.

The Court: Same order.

The Clerk: Defendant's Exhibits V and W.

(Whereupon, plastic plugs referred to above were received in evidence and marked, respectively, Defendant's Exhibits V and W.)

Q. (By Mr. Naylor): Mr. Welch, what type of cement do you presently employ in sealing the ends of the dipsticks in commercial practice?

A. It is a cement, Mr. Naylor, that I make myself. If the Court wishes I would perform how I make it, but I wouldn't like to divulge it.

Q. Do you preserve it as a trade secret? [475]

A. Yes, sir.

Q. And has that been true since you came upon the particular formulation that you now employ?

A. It was a discovery of my own. I went to many people for help. It was a discovery of my own. I am the only one that makes it and I am the only man that has ever made it, as near as I know.

The Court: I don't think there is any necessity for going into the essence of the formula.

Mr. Naylor: I thought we should divulge the

(Testimony of C. Martin Welch.)

present status of it as a trade secret, so that your Honor would be informed as to why we did not forthrightly divulge it.

The Court: All right.

Mr. Naylor: If the Court please, I am endeavoring to cut this down a lot. I have a lot of documents. Mr. Swain and I discussed the possibility of some stipulation with respect to the final phases of Mr. Welch's testimony and I gave considerable thought to that last night, but I was unable to come up with any stipulation that would seem to serve the purpose. And what I am endeavoring to do this morning is to take key topics and the points that should be brought out to your Honor's attention and examine Mr. Welch with respect to them. And in that process I am eliminating a lot of detailed examination concerning some of these exchanges of correspondence and things of that nature. [476]

Q. Mr. Welch, I call your attention to what purports to be the office copy of a communication dated August 28, 1948, and will ask you to examine that and identify it if you can?

A. I recognize this as my copy of a letter written to Harry Wenk of Los Angeles.

Q. Is there reference there to the matter of dimensioning of the parts of the dipstick?

A. Yes. Tolerances—is that what you have reference to?

Q. Yes. Is there a reference to an enclosure of any kind in that communication?

A. I state I will send them down with this paper

(Testimony of C. Martin Welch.)

cemented on for use as a check gauge, and further that I must have a real snug fit.

Q. I direct your attention also to a document dated August 28, 1948, and will ask if you can identify that?

A. This is a purchase order we speak of in the letter here on the first line saying, "Need the enclosed, or, rather, a partial shipment of same at your earliest convenience." The order is for 3,000 feet of three-quarter inch square tubing and 6,000 feet of one-quarter inch round tubing.

Q. Does this appertain to the first tubing ordered by you after the initial order to Plastic Process Company?

A. This was ordered before I received any further orders from Pan American, but I had made a commitment to Mr. Grindle that I would replace all of the dipsticks remaining in his [477] stock that I had delivered that had the distorted ends as soon as possible, and I succeeded in doing it only in latter October.

Q. I note the quantity here. Does that bear any relation to the commercial development or extension of the commercial development?

A. We were—I was promised through Mr. Grindle by Pan American that they would immediately process another order for dipsticks for us, for one or two hundred. And when I received that order I am not sure, but I ordered that tubing on the strength of having to replace what I had committed myself to replace at Pan American plus an amount

(Testimony of C. Martin Welch.)

to take care of the promised orders from Pan American.

Mr. Naylor: We will offer the communication, your Honor, as defendant's next.

The Court: It will be received.

The Clerk: Defendant's Exhibit X in evidence.

(Whereupon, letter referred to was received in evidence and marked Defendant's Exhibit X.)

Mr. Naylor: And the purchase order as the next in order.

The Clerk: Defendant's Exhibit Y in evidence.

(Whereupon, purchase order referred to was received in evidence and marked Defendant's Exhibit Y.)

Q. (By Mr. Naylor): Mr. Welch, was it your practice to affix your name to the dipsticks of your manufacture? [478]

A. From the beginning.

Q. And how did you do it in the beginning?

A. I rubber-stamped them on the first—on the first orders that were delivered to Pan American the name was rubber-stamped on.

Q. In that connection, I will show you what purports to be a statement dated August 5, 1948, from Kaus Rubber Stamp Company, and will ask if you can identify it? A. Yes, I can identify it.

Q. Is there any reproduction of the rubber stamp on that particular invoice copy?

(Testimony of C. Martin Welch.)

A. Yes; the invoice is for three rubber stamps and it has been and today the practice of Kaus Rubber Stamp Company to stamp on the invoice with the actual rubber stamps that he manufactures a copy of that stamp, and the copy of the three stamps reads: "Manufactured by C. Martin Welch, 55 New Montgomery Street, San Francisco." Another rubber stamp reads, "Fuel Tank Dipstick, an accurate measuring gauge." And a third reads: "C-54 Aircraft."

Mr. Naylor: Thank you. We will offer that, your Honor, as Defendant's next.

Mr. Swain: May it please the Court, I have no objection to this exhibit. I don't want to object because I want to get the case on, but I think that an answer such as the last one is subject to being stricken because it purports to state [479] the method of doing business of this rubber stamp company. I think all this witness can testify is when he got the bill it had the impression of the stamp on it. I don't think he could very well testify as to what their method of doing business is.

The Court: That objection may be good, but this exhibit speaks for itself.

Mr. Swain: I appreciate that, your Honor.

The Court: As far as the three rubber stamps are concerned, and the price, and the number, how you designate that—No. 0 stamp, No. Zero stamp, one zero stamp.

A. Excuse me. One No. zero stamp.

The Court: One No. zero stamp with the sales

(Testimony of C. Martin Welch.)

tag and the total price. It will be admitted for that limited purpose.

The Clerk: Defendant's Exhibit Z in evidence.

(Whereupon, Kaus invoice was received in evidence and marked Defendant's Exhibit Z.)

Mr. Naylor: But my offer was within that limited purpose, your Honor.

The Court: Yes.

Q. (By Mr. Naylor): Did you receive a second order from Pan American?

A. Yes; I did receive another additional order shortly after delivery of the first one.

Q. And I will show you here an invoice that purports to be [480] dated August 28th. Does that relate to the second or the first?

A. Oh, this particular invoice, the typewritten part of it relates to the initial order. I have made an entry in my own handwriting that covers the invoice of the second order, order for 100, and dates it as being November 15, 1948.

Q. November 15, 1948?

A. At the price of \$3.80 a dipstick.

Q. How were the ends of the sticks in the second order sealed, Mr. Welch?

A. With laminated plugs.

Mr. Naylor: With laminated plugs. We will offer that, your Honor, as defendant's next.

The Court: Let it be received.

The Clerk: Defendant's Exhibit A-1 in evidence.

(Testimony of C. Martin Welch.)

(Invoice of 11/15/48 was received in evidence and marked Defendant's Exhibit A-1.)

Q. (By Mr. Naylor): Who was the patent attorney you consulted in the matter of filing the application that resulted in the patent in suit?

A. Baldwin Vale.

Q. Do you recall approximately when you first consulted him?

A. I have not as yet been able to establish through memos or anything else the date of my first talk with Mr. Vale; I assume it to be the latter part of 1948. [481]

Q. The latter part of 1948?

A. I have no proof whatsoever in my files that indicates so; I have only a check written to him in the first part of 1949.

Q. I show you what purports to be a check dated February 7, 1949, and will ask you if you can identify that?

A. This is the cancelled check I just spoke of.

Q. And to whom is it payable?

A. To Baldwin Vale.

Q. And in what amount? A. \$21.50.

Q. Do you recall what that was intended to cover?

A. I believe it was for a patent search—search charge—a patent search charge, I believe.

Q. What did you ask him to do when you originally went there?

A. To find out if my item was patentable and,

(Testimony of C. Martin Welch.)

if so, to proceed with a patent application on that item.

Q. What did you furnish Mr. Vale on the occasion of your first visit to his offices, if you recall?

A. To the best of my recollection, I would have taken him dipsticks in various stages of completion. I still at the time had not made production drawings of my various calibrated dipsticks. However, I recall taking him in a drawing that we made early in the history of the dipsticks covering the [482] type or manner which we at that time were using.

Q. Do you recall who made that drawing for you?

A. Yes; Louis Klein.

Q. Louis Klein, your neighbor?

A. Next door neighbor.

Q. Do you recall supplying Mr. Vale anything else at that time?

A. I gave him also—could have given him; I am not sure, Mr. Naylor. I could have given him drawings of United Airlines or a drawing of United Airlines and/or a drawing of Pan American Airlines of a particular dipstick and possibly a DC-6 or B-377 Boeing aircraft or C-54. It would have to be one of the three because they were the only three types of dipsticks we were manufacturing at the time.

Q. You have a belief that you may have given him one of such drawings; is that correct?

A. I am not positive. It would seem likely I would have done so.

Mr. Naylor: We will offer check, your Honor,

(Testimony of C. Martin Welch.)

as Defendant's next.

The Court: Let it be received.

The Clerk: Plaintiff's Exhibit B-1 in evidence.

(Whereupon, check dated 2/7/49 was received in evidence and marked Defendant's Exhibit B-1.)

Q. (By Mr. Naylor): Eventually you proceeded with an application [483] through Mr. Vale's office, did you not? A. Yes.

Q. Incidentally, Mr. Vale is deceased, is he not?

A. That is correct.

Q. He died some three or four years ago?

A. Four years ago, I believe; three or four years ago, 1951 or '52.

Q. Did he die before——

A. I believe he died in 1950—six years ago.

Q. Did he transmit the patent to you or did someone else?

A. No; Warren Gifford Hardy transmitted the patent to me and that was done—and that further convinces me that he must have died in 1950. That was done in either December of 1950 or January, 1951.

Q. Before the patent actually issued?

A. This is the issuance of the patent I am speaking of.

Q. Did you obtain from Mr. Hardy Mr. Vale's file on this application?

A. Recently or when we were into litigation on

(Testimony of C. Martin Welch.)

this case, well into it, I requested that file from Mr. Hardy.

Q. And is this the file that Mr. Hardy gave you?

A. That is the one.

Mr. Naylor: Your Honor, I would like to know that this is an office file history that dates back into the period when Mr. Vale had this matter in his hands and it was then [484] concluded by Henry Gifford Hardy as the file indicates. I would like to interrupt the interrogation of the witness on this particular point at this time and give this file intact to Mr. Swain and allow him to inspect it, because we have obviously not endeavored to reproduce a file of this character. But I do want eventually for this file to come in as an exhibit on behalf of the defendant because of the contents that are here. And if I may, I would like to interrupt the interrogation of Mr. Welch and give Mr. Swain ample opportunity to inspect the file and its contents.

The Court: All right. Do you want to do that now, Mr. Swain?

Mr. Swain: I can do it probably during the recess.

Mr. Naylor: I thought during the recess would be the best time.

Q. Mr. Welch, did you at any time apply to dipsticks of your manufacture a notice indicating the pendency of a patent application?

A. I did upon Mr. Vale's suggestion, I believe on the occasion of the first visit or certainly early

(Testimony of C. Martin Welch.)

in seeing him; he suggested I could stamp them, "Patent Pending."

Q. Did you follow that advice?

A. Yes, I did; on the dipsticks sold by me from the last half of 1948 on through—1949, I mean to say—on through the year 1950. Early in the year 1950 when I had completely [485] restocked all of the calibration charts I had previously been using, at which time the words "Patent Pending" were imprinted thereon; and upon receipt of the patent number in latter 1950 all charts shipped all airlines were imprinted "Patent number," and with the number on there.

Q. I would like to show you at this time another statement from Kaus Rubber Stamp Company, and I will ask you if you can identify that?

A. I can identify that.

Q. What is the date of it?

A. The date of it is July 19, 1949.

Q. And briefly, what does it cover?

A. Two rubber stamps. One that read, "Patent Pending," which is stamped on this invoice; and another that read, "Trade-mark" widely spread so that it would go on either side the call-out name of the dipstick, which we used as M.W. fuel tank dipstick.

Q. For what purpose was this stamp produced?

A. The trade-mark stamp was produced so that "Trade" would go on one side of the M.W. call fuel tank dipstick call-out and "Mark" would go on the

(Testimony of C. Martin Welch.)

other side. This was one stamp, while it appears on here that it is two—it was one long stamp.

Q. To what document or thing was this stamp applied?

A. To the internal paper charts that were cemented onto the [486] wood and contained in this square plastic tubing.

Q. Was this stamp used in relation to paper charts that had been previously printed?

A. This would be the stock of paper charts I had in existence at the time which would include, to the best of my recollection, only three different calibrations, calibrations for three different airlines, namely, DC-6 and the Boeing 377 and the C-54.

Mr. Naylor: May I offer that as defendant's next, your Honor?

The Court: Let it be received.

The Clerk: Defendant's Exhibit C-1 in evidence.

(Whereupon, statement of Kaus Rubber Stamp Company, 7/19/49, was received in evidence and marked Defendant's Exhibit C-1.)

Q. (By Mr. Naylor): You mentioned that the words "Patent Pending" were printed on the charts of the dipsticks. I will show you at this time what purports to be an invoice with certain charts annexed and I will ask you if you can identify that?

A. I can identify it.

Q. What is it?

A. An invoice—two separate invoices, each for 200 fuel tank dipstick charts.

(Testimony of C. Martin Welch.)

Q. Whose invoice is it? [487]

A. An invoice from Lawhern & Lubfin who did our printing for us.

Q. And the date of it, Mr. Welch, or the date of them? A. 7/15/49 and July 22, '49.

Q. Are there any charts annexed or coupled to the invoices?

A. Yes; these charts attached to them represent the two particular charts that were ordered at that time on the occasion of the first delivery of parts to United Airlines.

Q. How can you tell that?

A. I establish this because I recognize the calibrations contained thereon and the part numbers as those furnished us by United Airlines for those two particular aircraft, and our office records establish the date as being prior to the receipt of these invoices by just a few days.

Q. Now, do the printed charts——

A. These represent also, may I further add, the initial invoices ever received from this firm. Their records may even show that these were the first two jobs they ever ran for us; I am not certain.

Q. Do the charts bear the "Patent Pending" notice?

A. The charts in what I recognize as approximately 14 point type read, "Patent Pending," on the top four-inch title label area as we call it on the dipsticks.

Q. Is that in proximity to your name and address on the article? [488]

(Testimony of C. Martin Welch.)

A. Patent—the word “Patent” is on the left-hand side and within a quarter of an inch of the words, “Manufactured by C. Martin Welch & Company.” The word “Pending” is on the right-hand side, I would say, within a quarter of an inch of the word “Company.”

Q. Do you have any positive recollection as to whether or not charts thus printed were actually physically applied to dipsticks of your manufacture and sale? A. Well, I know they were.

Q. You know they were?

A. They were the only charts we had to make the dipsticks with.

Mr. Naylor: We will offer that as defendant's next.

The Court: It will be received.

The Clerk: Defendant's Exhibit D-1 in evidence.

(Whereupon, invoices of 7/15 and 7/22/49 were received in evidence and marked Defendant's Exhibit D-1.)

Q. (By Mr. Naylor): After the transaction you have just been describing, was it your practice to cause the words “Patent Pending” to be imprinted on the charts used in the sale of sticks to other lines? A. Yes.

Q. I hand you a sheaf of documents and will ask if you can identify them as a collective group?

A. I can identify them. [489]

Q. Just state briefly to the Court what they are without too much elaboration.

(Testimony of C. Martin Welch.)

A. The three separate parts—one is an invoice dated July 12, 1949; the second is a purchase order from Trans Ocean Airlines dated July 12, 1949; and the third is a chart used in fulfilling that purchase order.

Q. And does the chart bearing the patent pending notice?

A. The chart has "Patent Pending" on it.

Mr. Naylor: We will offer that, your Honor, as a further illustrative exhibit next in order.

The Court: Let it be received.

The Clerk: Defendant's Exhibit E-1 in evidence.

(Whereupon, group of documents referred to was received in evidence and marked Defendant's Exhibit E-1.)

Q. (By Mr. Naylor): Mr. Welch, following the issuance of patent, did you cause a different patent notice to be applied to dipsticks of your manufacture and sale?

A. Immediately following the receipt of the patent from Warren Gifford Hardy——

Q. You mean Henry Gifford Hardy?

A. Or Henry Gifford Hardy—we caused to be imprinted a duplicate stock of all the charts that we were then using, and upon receipt of same and within the next several weeks period we destroyed our old stock and we manufactured from that date forward all dipsticks with the patent number [490] on them to all airlines.

Q. Would that include Pan American?

(Testimony of C. Martin Welch.)

A. I would like to establish that the "Patent Pending" that was rubber stamped on the dipstick was meant to include all airlines, also Pan American.

Q. Also Pan American. Did the patent notice appear on charts affixed to dipsticks delivered to Pan American in fulfillment of their orders?

A. Yes; most definitely. They were the same charts for one particular aircraft by quite a few airlines. I would like to identify it as part No. MW2937 for the Boeing Aircraft.

Q. Boeing Aircraft? A. Boeing Aircraft.

Q. What particular airplane is that?

A. That is the B-377 Stratocruiser.

Q. Mr. Welch, I would like to show you a sheaf of documents and ask you if you will, as expeditiously as possible, identify those for the Court?

A. The two blue copies purport to be our shop packing slip made up to the Flying Tiger Line and dated January 16, 1951. The two white charts I identify as, one, our number 4008-B, which is the calibration chart for the C-54 aircraft, based on the calibration furnished us by Flying Tiger Airlines; and, second, part number MW4600-F, a calibration chart for the C-46 aircraft, and again based on calibrations received from [491] Flying Tiger Airlines.

I would further like to identify them as most likely the initial charts; they represent in our books the initial invoicing done that year, and they would

(Testimony of C. Martin Welch.)

then be the initial charts, we having received, they——

Q. Directing your attention to the charts, do they bear the patent notice?

A. They have on either side of the marking, "Manufactured by C. Martin Welch and Co.," with my address on it, the words "Patent" and then "No. 2534644."

Q. Do both charts bear the same notice?

A. Both charts bear the identical markings.

Mr. Naylor: We will offer that, your Honor, as defendant's next in order.

The Court: It will be received.

The Clerk: Defendant's Exhibit F-1.

(Whereupon, charts referred to above were received in evidence and marked Defendant's Exhibit F-1.)

The Court: We will take the morning recess at this time.

(Recess.)

Q. (By Mr. Naylor): Mr. Welch, I show you another sheaf of documents and ask you if you will very briefly identify those for the Court? [492]

A. Yes; I can identify them. The first is a packing list made out to Slick Airways, dated—there is no date on the packing list; there is a date on the Slick Airways purchase order, 1/16/51.

Q. And the other document?

A. The second is a letter dated January 17, '51,

(Testimony of C. Martin Welch.)

from Slick Airways, supplying us with the calibration date for the C-46 aircraft. The third is the second page of that letter, and the fourth is the actual chart that was produced from the calibration furnished us from the letter.

Q. Does that chart bear the patent notice?

A. That chart was part No. MW4600, bears the patent number 2534644 on adjacent sides of, "Manufactured by C. Martin Welch and Co."

Q. Did these two last exhibits mark the commencement of your use of that patent notice?

A. That would very likely be the third chart shipped during that year.

Q. And has it been your consistent practice to use the patent notice on the charts since that time?

A. It is on all charts and has been on all charts since the first—I would say since the month of January, 1951.

Mr. Naylor: I would offer this, your Honor, to illustrate that as Defendant's next.

The Court: It will be received. [493]

The Clerk: Defendant's Exhibit G-1 in evidence.

(Whereupon, chart and attached documents were received in evidence and marked Defendant's Exhibit G-1.)

Mr. Naylor: I understand, Mr. Swain, you have had an opportunity to examine Mr. Vale's file?

Mr. Swain: Yes; I have examined it and it all seems perfectly in order.

Mr. Naylor: Thank you. Your Honor, I don't

(Testimony of C. Martin Welch.)

want to—as a matter of fact, I don't have a witness since Mr. Vale is deceased and Mr. Hardy came into the picture quite late in winding up this patent application; but for the purpose of illuminating the defendant's evidence in this case, I would like to offer this file as a composite exhibit for reference purposes if the Court should care to examine it at any stage.

The Court: You have no objection to that, have you, Mr. Swain?

Mr. Swain: No, your Honor.

The Court: Let it be received.

The Clerk: Defendant's Exhibit H-1 in evidence.

(Whereupon, file referred to above was received in evidence and marked Defendant's Exhibit H-1.)

Q. (By Mr. Naylor): Mr. Welch, I should like to ask you about the answer in this case which, as you know, admits the invalidity of claim 1 of this patent. Will you tell the Court [494] briefly why that admission was made in the answer, what led to it?

A. Mr. Naylor, you recall you advised me to—upon receipt of this complaint and the allegations made therein and talking over them, you advised me to make a very diligent search to come up with proof of delivery of the first parts. I had informed you at the time that I had delivered the first parts on the 28th of August. I based that information or that statement completely and wholeheartedly on an

(Testimony of C. Martin Welch.)

invoice date for 100 dipsticks dated August the 1st—August 28th, rather, and which we have submitted as an exhibit.

During the year 1948 and the previous several years and the following year or two, my financial condition was such that we needed at all times all possible monies we could possibly obtain as soon as we could obtain them. Particularly in 1948, I am not a bit ashamed that our gas meter was shut off by the gas company, our milk supply was cut off by the Golden State Milk Company. I mention that because I further want to stress how hard up, shall we say, I was for money. Having in my records at the time this litigation was started no other proof to refer to as to the delivery of the dipsticks but the invoice copy, and having since 1948 to this very day invoiced all orders—I will say right now all orders—on the day I shipped them or the day after—the day following, I was quite confident then that I would not be able to come up [495] with any date other than August date as the delivery date of the first parts. And I went to set about to make a very diligent search for the proof required further than the invoice, hoping against hope I wouldn't find any, and upon a visit to Pan American, I examined a microfilm record. They could produce no receiving copies; they stated that all copies of 1948 were destroyed long before that, or some time before that. And from this microfilm I found the delivery of the partial shipment of '54 parts was apparently effected by me on the 12th day of August.

(Testimony of C. Martin Welch.)

Q. 12th of August, 1948?

A. 1948. And I was quite disheartened about it, and I phoned you the information in a humble confession to you that I had to be wrong.

Q. And we directed your attention, did we not, to the fact that the patent application had been filed by Mr. Vale on August 17, 1949?

A. You did that, and it wasn't until I received the complaint from the plaintiff that I knew that you had to apply for a patent within one year after——

Q. You say you didn't know that?

A. I did not know it. It wasn't until the date of the filing of this complaint that I learned that you had to file within one year after submittance or delivery of the first parts. [496]

Q. Did you have any conversation at all with Mr. Vale concerning this one year permissible public use factor?

A. No, I didn't.

Q. At any time?

A. No, not as I recall.

Q. Did you have any conversation with Mr. Hardy about it?

A. No, I have never to this day seen Mr. Hardy. I have talked to him only on the telephone and that is when we were winding up the patent.

Q. Now you say that the microfilm—by the way, did you see the microfilm personally?

A. Yes, I personally viewed it through a viewer they have out there.

Q. They exhibited it to you?

A. Yes.

(Testimony of C. Martin Welch.)

Q. And I assume you then reported those facts back to us as counsel?

A. Immediately I drove into the city with the sad information, yes.

Q. And it was on the strength of those findings then that the invalidity of claim 1 was admitted; is that correct?

A. You told me that we had no chance to save it; I had delivered parts one year and five days after—let's say had delivered parts on August 12th of 1948, and the patent application filing date was August 17th, 1949, and the five [497] days then loomed to such great importance that I, upon your advice, signed a disclaimer of the patent—agreed to sign, shall I say, a disclaimer.

Q. This related, did it not, solely to the initial delivery of 54 of the items?

A. The first 54 parts that were delivered, yes, of which seven were rejected, so it related to 47 parts.

Q. And just so there will be no misunderstanding about that, the first 54 dipsticks delivered to Pan American were constructed in accordance with Plaintiff's Exhibit 18 that you have been examining here insofar as the ends were sealed with a cement?

A. Yes; I can even say that this particular dipstick is one of the first 54 or the second 46 group which was replaced by me in October, and the only one in the whole group that was saved, and it was saved out of sentimental reasons because it represented the first type—similar to the first dipsticks or one of the first dipsticks sold.

(Testimony of C. Martin Welch.)

Q. What were your findings on this search that was suggested by your counsel with respect to the laminated plug type of closure which is the subject matter of claims 2 and 3?

A. I don't follow you, Mr. Naylor. What were my findings?

Q. Yes. What did you find with relation to the delivery of the first laminated end sticks?

A. Well, I determined through manufacturing the laminations [498] in October of 1948——

Q. October, 1948?

A. Yes, and they were used on the parts replaced, the 40 odd—approximately 40 dipsticks that were still in stock at Pan American at that time, and prior to delivery of the second order for a hundred I replaced approximately 40 of the initial hundred delivered, which I say again this dipstick we produced in court is one of that returned group. From that date forward all dipsticks manufactured for all airlines, including Pan American, were sealed——

Q. And the production of the laminated ones commenced in October, 1948?

A. Latter October or first part of November. The parts were delivered, as I recall—the 40 odd replacements parts—just prior to the delivery of an additional hundred parts, which represents a shipment of approximately November 15th of that year on the second order to Pan American.

Q. Reference was made in the opening statement in your behalf to a disclaimer in the patent. Do you recall executing the disclaimer?

(Testimony of C. Martin Welch.)

A. Yes, I do, Mr. Naylor.

Q. I will show you what purports to be a carbon copy of a document and will ask if that is a copy of the disclaimer that you executed?

A. This is one with my signature on it. [499]

Q. And was it signed concurrently with the original.

A. I signed, as I recall, four or five copies, at least three copies, the day that I signed the original.

Q. Do you know what happened to the original?

A. You informed me that you—as a matter of fact, while I was in your presence you dictated a short note to your stenographer and informed her to include with that note to the Commissioner of Patents, I believe in Washington, D. C., the disclaimer, the original copy.

Mr. Naylor: We will offer the carbon copy of that, your Honor, as defendant's next exhibit.

The Court: It will be received.

The Clerk: Defendant's Exhibit I-1 in evidence.

(Whereupon, the disclaimer referred to above was received in evidence and marked Defendant's Exhibit I-1.)

Mr. Naylor: Your Honor, just as a formality—I don't think Mr. Swain has any particular objection to it, but I have a duplicate of the letter of transmittal to the Commissioner of Patents relating to this disclaimer. Is there any objection to that?

Mr. Swain: No, Mr. Naylor.

Mr. Naylor: We will offer the carbon then, your Honor, as defendant's next, just to complete that

(Testimony of C. Martin Welch.)

transaction.

The Court: Receive it. [500]

The Clerk: Defendant's Exhibit J-1 in evidence.

(Whereupon letter of transmittal was received in evidence and marked Defendant's Exhibit J-1.)

Q. (By Mr. Naylor): Mr. Welch, have you made a collection of competitive and earlier dipsticks in use by the airlines for the purpose of demonstration here in court?

A. I have, Mr. Naylor, yes.

Q. To what sources did you go in making this collection?

A. Several of them I obtained from the basement of my home that I had saved. They would represent dipsticks in use in 1948. Several others I obtained—I believe one from Western Airlines at the International Airport, one from, I believe, United Airlines, and one, I believe, from Pan American Airlines, and I believe one from—I don't know—Southwest Airlines. I think I picked one up there. I am not positive as to the various places I picked all of these up at. I looked and asked every airline at the International Airport for old dipsticks.

Q. For old dipsticks?

A. Yes, other than the plastic type they were presently using. And not very many of the people out there had old dipsticks around. They all had the current type and all purchased from me the current type of dipstick that I manufacture.

(Testimony of C. Martin Welch.)

Q. I would like to ask you, did you make any inquiry, [501] any general inquiry in relation to these dipsticks that you collected as to the price range of them?

A. Yes, I did that, very definitely.

Q. Will you tell the Court what you did in that connection, please?

A. I reviewed with a supervisor at one of the major airlines at the field a Douglas manual showing the list price of a particular part number for a hexagon metal stick that I had at my home, and the part number is stamped on the metal stick. We referred to the 1948 manual. He was reticent to give me the copy, but I doubt if it is necessary to produce it in court; we can, upon demand. The list price of that dipstick is \$26.00.

Q. \$26.00?

A. \$26.00. I think it was considered then and is today quite inferior to the one I was producing then, and the one I am producing today.

Q. I show you a dipstick and ask you if that is the one to which you just had reference?

A. This dipstick with the Douglas part number stamped on it is the one I had reference to, and this Douglas part number appears opposite the pricing in the Douglas book.

I would like—may I make a further observation about this metal stick?

Q. Yes. [502]

A. It was testified earlier in this court that you couldn't put a nail in the bottom of a dipstick

(Testimony of C. Martin Welch.)

because nobody would be allowed to use it; the metal would cause a spark. This dipstick here has been used and was in use prior to 1948 and it is metal. It too could probably, under that theory, cause a spark.

Q. Did you find other metal dipsticks?

A. Yes.

Q. Or stick?

A. The Roylin stick used currently on Congo airplanes is metal.

Mr. Naylor: We will offer these, your Honor, for the purpose of illustrating Mr. Welch's testimony.

(Whereupon, sample dipsticks were received in evidence and marked Defendant's Exhibit K-1.)

The Witness: These C-54 samples I have in the collection I believe are metal.

The Court: What is this made of?

A. I am not certain what alloy it could be. It is a light alloy.

Mr. Naylor: I don't know, your Honor. It is one of the lighter weight alloys.

The Court: It couldn't be aluminum, could it?

A. I don't know. It might be.

Mr. Grindle: It would have to be, your [503] Honor.

Q. (By Mr. Naylor): I direct your attention to another metal dipstick.

A. I believe this to be one I could have picked

(Testimony of C. Martin Welch.)

up at Pan American, but I wouldn't swear to it. I picked it up at one of the airlines.

Q. One of the airlines? A. Yes.

Q. At International?

A. At International, yes.

Q. I show you still another one.

A. This I recognize as a Roylin type dipstick that can be priced in today's catalogue at \$11.50, I believe, made by the Roylin Company in the Southern part of California. It has a fabricated hook. I think that doesn't come with it—fabricated loop, I guess, for the purpose of carrying it and hanging it, possibly. This is one of the type that would trap fuel in holes in the dipstick.

Q. May I see them?

A. Two of them, incidentally, are required for an airplane if they come attached to the filler cap, which I believe that type does.

Q. Is the calibration indicated anywhere on the stick?

A. On the inner surface the calibration figures read from 100 through 500 in twenty gallon intervals.

Q. Incidentally, of what material is the loop that has been [504] affixed to it?

A. I suspect that that is brass or copper wire.

Q. And it is screwed onto the device, is it?

A. Yes, it appears to be screwed on with brackets.

Mr. Naylor: We will offer those in succession, your Honor, as defendant's next.

(Testimony of C. Martin Welch.)

The Court: They will be received.

The Clerk: Received as Exhibits L-1 and M-1.

(Whereupon, dipsticks referred to were received in evidence and marked Defendant's Exhibits L-1 and M-1.)

Q. (By Mr. Naylor): I will show you two further examples of what purport to be dipsticks and will ask if you know anything about them?

A. One of them represents a new—reasonably new, if not—I would say new dipstick for a DC-3 aircraft, the calibrations stamped thereon in Wipe-On paint affecting the numbers in white letters. The other one is a rather beaten up dipstick for a C-46 aircraft with calibration numbers stamped therein. I would like to add further that cost estimates of this type of dipstick range from \$4.00 to \$10.00—estimates of the United Airlines. I further would like to state that Mr. Grindle advised me that prior to purchasing the plastic type dipsticks—this was well into our friendship period of the later '49, '50, '51—advised me that Pan American's price or cost for manufacturing [505] dipsticks was estimated at \$10.00 apiece prior to my dipstick. And that is vivid in my mind because, good friends that we were, I criticized him for not allowing me this information when I first offered him a \$3.00 quote and found out that I couldn't successfully manufacture it at \$3.00, then \$3.80, and then a \$5.00 quote.

Q. Coming back to the black dipstick, what was

(Testimony of C. Martin Welch.)

the price range you were given to understand was applicable to that?

A. This type of dipstick was manufactured by two different airlines that I know of, this type of dipstick, who estimated—one, United Airlines estimated it at \$10.00; and the other one, Southwest Airways, estimated it at \$4.00. I questioned their estimate and they simply stated that these are made in a particular line station in their area by a fellow who doesn't have much more than one or two flights a day to meet and, as a consequence, little overhead is figured on his time; when he is not busy, he makes several of these dipsticks.

Mr. Naylor: We will offer these as defendant's next in order, your Honor.

The Court: They will be received.

The Clerk: Defendant's Exhibits N-1 and O-1.

(Whereupon, dipsticks referred to were received in evidence and marked Defendant's Exhibits N-1 and O-1.)

Q. (By Mr. Naylor): Were you present when I was examining [506] Mr. Grindle concerning the period of your friendship with him?

A. Yes, I was.

Q. What is your best recollection as to the period you enjoyed Mr. Grindle's friendship?

A. I would say that it ran or began within a reasonably short time after delivery of the first parts, developed into a close friendship in the early part of 1949. We saw each other frequently during

(Testimony of C. Martin Welch.)

the year 1949 on golf courses; we had a minimum of half a dozen golf games together, at least three of which were in the company of mutual friends, or, shall I say, friends of mine. We had many social meetings at our home and in his apartment here on Kearny Street and later when he moved to Burlingame, at his apartment there. This friendship carried up to the last social meeting I had with him in 1953; not as he testified, 1950 or '51; I am not sure which—well into 1953.

Q. Now, as I understand it, commencing in 1948, the dipsticks of your manufacture were assembled in a basement shop of yours; is that correct?

A. In 1948 and '49 and half of '50 they were assembled in an area, I would rather call it, because I hadn't remodeled my basement; there was a whole working area in the basement. In 1950 we built a workshop as such down there that still serves its purpose. We wind up at least [507] the dipsticks, inspect them and ship them from that same spot now. However, I don't have anything to do with the manufacture or assembly of them other than that today.

Q. On the occasions of any of these visits to your home by Mr. Grindle, did you observe him in your basement workshop?

A. On most, if not all occasions in my home, he was adjacent to the workshop area; but most particularly, after the workshop was finished—we had a little rumpus room right next to it, and we spent the time down in that rumpus room.

(Testimony of C. Martin Welch.)

Q. Did you make any effort to conceal from Mr. Grindle the fact that dipsticks were being fabricated or assembled in your basement at any time?

A. No, none whatsoever.

Q. Did you make it evident in any way?

A. I would say that everyone that came to my home probably during those years—it was a topic of moderate to peak interest to us—saw us either working on dipsticks, or were shown dipsticks or handled them in some fashion.

Q. Was the making of dipsticks limited to your basement area, Mr. Welch?

A. No, we manufactured—not manufactured; we assembled parts of them on the dining room table and the kitchen table.

Q. Was this a family project? [508]

A. At that time it was, yes.

Q. Did Mrs. Welch take part in this?

A. A very active part in it at the time, yes.

Q. And upon having guests did you conceal this work or the fact that this work was going on in your house?

A. No, we, if anything—this has been our practice since we have been married—when a guest dropped in the door, we would drop what we were doing to take care of the guest, and we didn't cover—if there was anything, we pushed it aside. There was no effort made at any time to conceal our project from anyone.

Q. And you say anyone—

A. Rather, we were proud of it.

(Testimony of C. Martin Welch.)

Q. Would that include Mr. Grindle?

A. Oh, most definitely. We would have no reason whatsoever to conceal anything from him at that time.

Q. You mentioned that the friendship, according to your recollection, continued into the year 1953?

A. Yes, it did definitely continue until 1953.

Q. On what do you base that recollection?

A. I remembered of having seen him in '53 because in August of '53, came the threatening phone call—not on September 28th, as has been testified here, but it came several months after I knew at that time—several months after I had last seen him on a friendly basis. So I went in [509] search of proof of that social visit and discovered it and furnished it to you.

Q. And of what did it consist?

A. The registration records—visitors' registration records of the Transportation Club in San Francisco, Palace Hotel.

Q. You say that is a club in the Palace Hotel?

A. Yes; it has been in existence since 1905 or '04.

Q. And how long have you been a member of that club? A. Since 1946.

Q. And what did you learn when you examined the records of the Transportation Club?

A. I discovered the date sheet—the entry sheet of the club records of May 27th, and the reason the date is clear to me now is that I have seen the records recently.

(Testimony of C. Martin Welch.)

Q. I will show you what purports to be a photostatic copy of the visitors' register and will ask you if you see your own personal signature there or a facsimile of it?

A. In the—just below the center of the page I see under a column headed, "Introduced by" my signature, "C. Martin Welch."

Q. And is there a name opposite it?

A. Over in the lefthand, under "Name of Visitor," what is intended to be the name of visitor, is "Gene Grindle," with two dash marks in the center column—in the residence column, under "San Francisco." [510]

Q. Do you recall that particular visit you had with Mr. Grindle on May 27, 1953?

A. Quite vividly.

Q. What was the tenor of the visit?

A. I took him to lunch.

Q. Was it friendly?

A. Very friendly. As a matter of fact, we never did succeed in eating lunch.

Q. Why was that?

A. Because of the drinks.

Q. You mean you overindulged?

A. I remember us chasing each other down Bayshore rather foolishly—not speeding, but passing each other on Bayshore, and I know that I shouldn't probably have been driving my automobile that day.

Q. Was the entire visit on that occasion a friendly one?

(Testimony of C. Martin Welch.)

A. Very, very friendly. Extremely friendly. He divulged much information to me about his present operations at that time, or current operations at that time, regarding his vacuum cleanser, and told me what he was doing with it and who was interested in it; took me back to Chicago with him on an imaginary trip on the vacuum cleanser.

Mr. Naylor: We will offer that page, your Honor, as illuminating the witness' testimony.

The Court: It will be received. [511]

The Clerk: Defendant's Exhibit P-1 in evidence.

(Whereupon, visitors' register referred to was received in evidence and marked Defendant's Exhibit P-1.)

Q. (By Mr. Naylor): After this May 27, 1953, visit with Mr. Grindle, I understand that the next contact you had with him in August.

A. In August by telephone.

Q. By telephone. How do you fix August as the date for that?

A. The day I hired my present secretary was in July, and the day I hired a particular salesman, the only salesman I have ever had on the road, was in August. Our records show that on the 24th that I was absent from town, on the week ending the 22nd of August; that I hired this salesman and went over in my office with him on the 24th, what I expected in the way of his duties. And it was during this conference with this newly hired salesman

(Testimony of C. Martin Welch.)

that this telephone from Grindle came in to me. I had returned it and he was out when it came back to me. And to further clarify in my mind, I had asked my secretary to listen into the conversation and then motioned her away from it. The conversation lasted fully five minutes while this particular salesman was sitting immediately to my left. Concern was shown by the salesman and my secretary over my frame of mind upon hanging up on Mr. Grindle. I didn't discuss it with them at that [512] moment, but later in the day I admitted to this newly hired salesman and to my secretary all that transpired during the telephone conversation.

Q. And then did you call Mr. Grindle back or did you have any further conversation with him?

A. No, I had no further conference, as I recall, with Mr. Grindle. I could have had, but I don't recall it. The next thing I heard was from Mr. Fox, as Mr. Grindle in closing our conversation had told me I would be hearing from Pan American, they were going to sue me for everything I had.

Q. That last statement, was that Mr. Grindle's representation?

A. Yes; I was going to lose everything because I wouldn't acknowledge his participation in this or his claim to this invention.

Q. Now, you mentioned Mr. Fox. What was the incident in which Mr. Fox participated, as you recall it?

A. Well, he called me on the—on approximately the latter part of September, a month approxi-

(Testimony of C. Martin Welch.)

mately, or maybe a month and a half, around there, after the call from Mr. Grindle, he called me and asked me to drop by his office at Pan American.

Q. And did you know him prior to that time?

A. Never had—I don't recall of ever having seen the man [513] before or since.

Q. Did he identify himself?

A. As the legal attorney for Pan American.

Q. Did you call on Mr. Fox at Pan American?

A. Yes, I called on him.

Q. And did he indicate at that time the purpose of his call to you?

A. Yes, he did, and he asked me to review certain phases of it with Mr. Boyle and Mr. Kiester, which I did.

Q. Did Mr. Fox participate in the entirety of that conversation—of the initial conference, rather?

A. The initial conference with me?

Q. Yes.

A. Yes, but not, as I recall, with Boyle and Kiester. He asked me to see them; that they had the file.

Q. Was it a delegation, as you understood it?

A. I understood it to be a group of a sort that were appointed by someone out there to investigate my manufacture of dipsticks.

Q. To the best of your recollection, what was the substance of the conference with Mr. Boyle and his colleagues?

A. They presented the drawing D-32—06114 to

(Testimony of C. Martin Welch.)

me, and said, "This proves that we are entitled to the claim of the patent." And I said, "That's not the original drawing," and quite an argument ensued about it—not argument, but a [514] discussion ensued about it being the original drawing and my stating it wasn't. And I left the conference with this promise to Boyle and Kiester: I would produce a copy of the original drawing—not knowing at the time that I could, but with the thought in mind that a possible chance remained that I could find one in Los Angeles in possible existing files down there. It occasioned me a trip to Los Angeles to find this drawing.

Q. And did you subsequently make a search of your own files?

A. Yes, I went through as much as I could find. Some of my files have been misplaced. I cannot locate it—some of my file copy records.

Q. And did you make a trip to Los Angeles?

A. I did, immediately.

Q. Did you make a trip especially for the purpose of locating this drawing?

A. For one reason only; did no other business down there, and returned the same day.

Q. What did you do after you got down there? How did you start your search? Where did you search?

A. I started—they still owned the one building. I started in the attic of that one building and ended up in the storeroom of their current plant which is far removed from it—many, many miles removed

(Testimony of C. Martin Welch.)

away from their Hollywood address [515] as compared with their aviation address next to the airport now. And I located the file, the 1948 file, containing not only that drawing, but also the drawing we have introduced here as our original drawing received on about June 10th. The other drawing I speak of is the "A" numbered drawing of the extrusion.

Q. Directing your attention again to Defendant's Exhibit F, is that the print that turned up in your search at Los Angeles?

A. This I can identify as the exact print I located.

Q. Now, when you returned did you have any—I think you testified yesterday you had copies of that struck off.

A. Three copies, one of which I have since seen in the hands—in the possession of the plaintiff; three blue photostats.

Q. And did you retain this particular Defendant's Exhibit F? Did you retain that print?

A. Yes, I supplied it to you. I put it in the file and it was later supplied to you.

Q. Did you go back to Mr. Fox or Mr. Boyle concerning this matter?

A. I returned with two of the copies. I gave one to Mr. Boyle. I felt very good about being able to produce it, and told him that apparently they were in error, here was the original one I spoke of that they denied the existence of. [516] I did the same

(Testimony of C. Martin Welch.)

with Mr. Fox. And while Mr. Boyle was reticent to close the case there, Mr. Fox did with finality say, "We are not interested—Pan American is no longer interested in pursuing this matter. If Mr. Grindle cares to follow up any cause of action, he will have to do it in the civil court on his own expense."

Q. Is that your best recollection of the import of Mr. Fox's words to you?

A. That is as near as I can recall approximately what he said.

Q. I take it you are not attempting to quote him exactly?

A. No, I am not; I couldn't remember exactly what he said. That is the gist of it.

Q. From what he said to you did you gain the impression that the matter was a closed incident?

A. I left very friendly with Mr. Fox, yes, and was left with the impression that they were no longer concerned. Never at any time during that conversation was it mentioned to me they were interested in overcharges or undercharges, as I recall. It could have been, but I don't recall it.

Q. You don't recall it?

A. But I am not having loss of memory for convenience's sake, just the sincere truth; I do not recall a long detailed conversation about overcharge on that day.

Q. Did you ever hear again from Mr. Fox? [517]

A. Never have heard from him since.

Q. Did you ever hear again from Mr. Boyle?

A. No, I have never heard or seen any of th

(Testimony of C. Martin Welch.)

two people—three people involved: Mr. Kiester, Boyle or Mr. Fox since.

Q. And your understanding was that the incident was closed upon the occasion of your second visit when you delivered the prints and had the conversation?

A. That was my complete understanding, yes.

Q. That was the end of it as far as you were concerned?

A. Absolutely.

Mr. Naylor: Your Honor, I am just about through with the direct examination of Mr. Welch with the exception of one further exhibit and then I will be able to close. We would like, however, to call a witness about whom I spoke to Mr. Swain yesterday, a Mr. Klein, who has been identified by Mr. Welch, and he is connected with the School District at Millbrae, and his time, of course, is not entirely his own, although he is under subpoena and responded to that subpoena. But we would like to accommodate him if it is agreeable by putting him on, say, at 2:00 o'clock.

Mr. Swain: That is perfectly satisfactory with me, your Honor.

The Court: All right. Then let us take up again at 2:00 o'clock. It is almost 12:00 o'clock.

Mr. Naylor: Thank you, your Honor. [518]

The Court: We will adjourn until 2:00 o'clock.

(Whereupon an adjournment was taken to 2:00 o'clock p.m.) [518-A]

Wednesday, February 29, 1956—2:00 P.M.

Mr. Naylor: If it is agreeable to your Honor, we would like to interrupt the final stages of Mr. Welch's testimony and call Mr. Klein at this time.

The Court: You may.

(Witness temporarily excused.)

Mr. Naylor: Mr. Klein.

LOUIS H. KLEIN

called as a witness on behalf of the defendant;
sworn.

The Clerk: Please state your name and occupation for the record.

A. Louis H. Klein, business manager, Millbrae Elementary Schools.

Q. How do you spell your last name?

A. K-l-e-i-n.

Direct Examination

By Mr. Naylor:

Q. Mr. Klein, are you testifying here pursuant to a subpoena that was served on you?

A. That's right.

Mr. Naylor: May I file that subpoena, your Honor?

The Court: All right.

Q. (By Mr. Naylor): Do you have any other business interests other than those you have stated, namely, business manager for the Millbrae Elementary Schools? [519]

A. Well, I am an inventor and a designer, and I do occasional jobs, yes.

(Testimony of Louis H. Klein.)

Q. Would you have any hesitancy in telling the Court what those other lines of endeavor are, if they are not confidential?

A. I have a line of crippled children's equipment; I have done building—I have a contractor's license which is being kept in force, although I don't use it on the present job. I design for myself and others such jobs as electric train layouts and it's quite a wide field. It is something I enjoy very much.

The Court: Is that sort of a sideline with you or do you make it any principal part of your occupation?

A. Up to the time, May of '52, when I went with the School District, it was my sole income, and since then what free time I do have I do these other jobs.

Q. (By Mr. Naylor): Do you maintain any shop facilities in connection with these part-time occupations that you are interested in?

A. Yes, I have quite a complete shop. I do wood-working and metal working, photography, and I have a good sized layout board for full size patterns, and I do molding work.

Q. I gather from the fact that you say you do layout work on patterns that you do drafting also?

A. Oh, yes. [520]

Q. In connection with your various projects?

A. Yes.

Q. Now, where do you maintain your shop, Mr. Klein?

(Testimony of Louis H. Klein.)

A. It is in the basement of my home.

Q. And that is located where?

A. 1328 Vista Grande next door to Mr. Welch.

Q. I assume that you are acquainted with Mr. Welch? A. Oh, yes.

Q. How long have you had such acquaintanceship?

A. I met him first before he moved down there, when I was pursuing a plastic tray, and I found his name in the phone book. He referred me to another plastic company and I was much surprised when they moved next door. And there was no connection, but I believe it was in '47—I am not sure just when.

Q. And have you had an acquaintanceship with him since that time, since '47?

A. Yes, ever since.

Q. Now, in your acquaintanceship with Mr. Welch, have you had any contact at all with fuel tank dipsticks? A. Yes, I have.

Q. And how did such contact come about? How did you learn about this?

A. Well, I had just returned from a trip to Los Angeles; I can establish the date of my return by my gasoline [521] receipts, which was May 8th of '48, and it was a few days after that—I couldn't just say how many—that Mr. Welch came over with a problem of a filler for this dipstick that he was going to make and the two of us cut the thing on my equipment, on my table saw.

Q. May I interrupt you to ask, you said that

(Testimony of Louis H. Klein.)

you could establish the date by reference to a certain trip that you had made to Los Angeles?

A. That's right.

Q. What was the purpose of the trip, please?

A. I was making crippled children's chairs at the time, and there was a metalworker strike, and I used a lot of aluminum castings in this, and I had to go down to Los Angeles to get these castings made, and as soon as they were finished, I paid the man and I came right back. And I also have brought checks and bills with me of those transactions to establish that date.

Q. Do you have those checks?

A. Yes, I do.

Q. And those things here?

A. These are the gasoline slips (producing).

Q. You have handed me a collection of what appear to be gas purchase receipts.

A. Yes, sir.

Q. Would you mind telling the Court briefly what you found [522] upon looking through that collection as to the date of your trip?

A. Oh, my first stop for gasoline going down was on May 3rd, 1948, in Fresno; and the last one I have, which is our local station, was on May 8th of 1948.

Q. And the slips in between reflect what?

A. Going and coming between the points.

The Court: I wish I could be so circumspect as to save my own.

(Testimony of Louis H. Klein.)

The Witness: Uncle Sam reimbursed me for these.

Q. (By Mr. Naylor): Now, do they indicate your presence in Southern California?

A. Oh, very definitely. Let's see. To take the return one, I filled up in Huntington Park at Slau-son and Soto Avenues in Los Angeles, which was my last stop before starting back to San Francisco, and that was on May 7th.

Q. Now, was there anything in your file, Mr. Klein, that indicates the transaction of business while you were there in relation to the business for which you had gone?

A. Yes, I have the two cancelled checks and the invoice for the castings I got from the Echo Foundry in Los Angeles. The first one is for a down payment so he would go ahead and do the work, and the other was the final payment.

Q. Thank you, sir. Now, you say it was within a few days after your return from this particular Los Angeles [523] trip that Mr. Welch came to you with the matter of finding a suitable wood filler for the dipstick? A. That's right.

Q. Will you state to the Court what Mr. Welch requested or indicated that he wanted done in that regard?

A. Well, he had these three pieces of plastic, one was a square tube, and two smaller ones, and he wanted the wood filler so that it would keep them in the opposite corners of the plastic and hold very tightly. And it was a little trick to make it. We

(Testimony of Louis H. Klein.)

made several of them before we got one that was satisfactory to him.

Q. Now, you say it was a little trick to make them. What do you mean by that, Mr. Klein?

A. Well, as you are pushing it through on a saw, you have to make two cuts for each corner, and just the least little twisting of it would throw a bow in there. It would be either too sloppy or too tight to hold these tubes in. Actually, with the equipment that I have, which is an ordinary eight inch table saw, each stick has to have four cuts the entire length of the stick.

Q. Did you do this cutting of sticks on the occasion of Mr. Welch's first visit in relation to a dipstick?

A. I would say so, yes.

Q. Is that the best of your recollection?

A. You mean his first visit in a business nature or just—— [524]

Q. His first—on the occasion of his first visit in which he indicated a desire for a suitable filler for a dipstick. Did you do the cutting on the first visit or at some subsequent time?

A. No, I think it was the first, because he came over especially for that filler.

Q. What time of day was this?

A. My guess is it was along in the afternoon or early evening.

Q. Afternoon or early evening?

A. Yes. It is purely a guess. I can't be sure.

Q. Now, did you set up your table saw to make the cuts that you thought were proper?

(Testimony of Louis H. Klein.)

A. Yes, I did.

Q. To produce this filler? A. I set it up.

Q. And what kind of wood did you work on?

A. Well, I had ordinary pine. I don't remember whether it was sugar pine or Oregon pine. One or the other. And that was what the first one was made of.

Q. And were the results satisfactory from your standpoint?

A. Yes, because my particular problem was just to get something that would fit in there snugly and hold those tubes in.

Q. Did you make any suggestion to Mr. Welch at that time [525] concerning an improved method of producing the wood filler?

A. No, not that I recall, other than if he expected me to do it in production for him, that I would not be able to, because I don't have that type of equipment. Mine is mostly experimental, making the first few pieces.

Q. Did you have any further conversation with him concerning the actual production of the wood fillers in quantity?

A. Well, yes, I did. I don't know whether it was on that same occasion or not, but we had talked about the production of it and I did give him a suggestion of where to go to get the millwork done.

Q. And what did you suggest in that regard?

A. That particular time was when we had come to the conclusion that the stick should be radiused at the bottom of the groove in order to have more

(Testimony of Louis H. Klein.)

stock left, because the straight cut went so deeply into the wood that there was no body left to it. And I suggested, because I had done designing for a firm, Fink and Schindler, that he go to them and they could probably do the work for him.

Q. Who were they?

A. They were—I don't know whether they are still in business or not, but they are cabinet workers, store fixtures and things of that nature.

Q. And to your knowledge, did Mr. Welch take your suggestion and go to Fink & Schindler? [526]

A. Yes, he did.

Q. And with what results, if you know?

A. Well, it developed that Fink & Schindler was not interested in small things of that nature, so they sent him to someone else, which was a few doors away. It was, I believe, on the same street and half a block west.

Q. Do you happen to know who that was?

A. Yes, I was there in the early stages. It was called the Shafer's Mill.

Q. You say you were there in the early stages. Will you tell us what you mean by that?

A. Well, I like to follow up as many suggestions as I make because sometimes the suggestions are just ideas and I like to see whether they actually work or not, and I was interested in seeing what kind of a setup this man would actually use to make it. And he had—I don't recall all the details now, but he was using a router, where the table saw, the

(Testimony of Louis H. Klein.)

blade comes up from underneath—this router is a vertical spindle with a cutter, and it cuts from the side (indicating). So as the material is fed in, it cuts this groove with a radius.

Q. And did you actually observe Shafer's Mill in the act of making a radius cut in the sticks?

A. He wasn't running any at that particular time, but I saw some of them that he had run and noticed that some of [527] them were waved and I told him that of course they wouldn't be acceptable because from the sample that I had made, we had to throw out that had any warps in them.

Q. I would like to show you Defendant's Exhibit N and ask if that corresponds substantially to the type of wood cutting that Shafer's Mill was set up to do.

A. Yes, it does. The only difference is in the wood. We were using soft wood the first time—pine.

Q. And that is a different wood, is it?

A. Yes, this is an ash, I believe.

Q. Now, coming back to the matter of the square cut wood filler that you say was made on your table saw, as I understand it, you felt that too much of the stock was cut away?

A. That's right.

Q. Were you able to produce any pieces that stayed together at that time?

A. I don't know whether it was at that particular time or not, but I do remember that in the development from the square cut to the radius cut that I did make one that left a little cross-section

(Testimony of Louis H. Klein.)

point; instead of the saw cutting to the full depth, it was just less than the width of the saw, so that it left a little tip on the inside. Now, that gained not quite a 64th or around there in cross-section, and that still wasn't the answer.

Q. Just for purposes of illustration, would you undertake [528] to make just a little rough sketch of that?

A. Yes. Here's the square that the wood is originally, and coming straight in like this, and it left a little section like that (indicating). The straight end cut, the first one we made actually was clean down in there. You can see that by doing this on both sides; the objection was to get as much stock through here as possible and we gained about this much. It was very little, not enough to do any good. So that led to the development or the idea of changing that, then, through a radius, in which you would get the actual benefit of the stock through here, and it wouldn't be so weak.

The Court: Will you explain to me just exactly—I don't quite get what you mean by "stock."

The Witness: When I speak of stock, it is the wood itself.

The Court: I see.

The Witness: I have taken this and it is a cross-section of the long piece, and it is the end view of it.

The Court: I see.

Q. (By Mr. Naylor): That had to do with a

(Testimony of Louis H. Klein.)

strengthening matter, didn't it, or stiffening matter?

A. Oh, yes, the more wood you could keep in there as a filler, the stronger it would be.

Q. Will you mark that with your name so that we can identify [529] it on this record, please?

A. If I had known that, I would have made a better one.

Mr. Naylor: Thank you. We will offer that just to illuminate the witness' testimony, your Honor.

The Court: It may be received.

The Clerk: Defendant's Exhibit Q-1 in evidence.

(Whereupon, drawing made by witness Klein was received in evidence and marked Defendant's Exhibit Q-1.)

Q. (By Mr. Naylor): Could you tell us approximately when it was that you saw the Shafer Mill set up and the samples of their first cutting of wood on a radius cut?

A. I would be afraid to hazard a guess, but it was certainly prior to the time that he would have billed Mr. Welch. You could pick up the date from that, because I was there before that; he was still in the process of doing the job.

Q. When you first——

A. When I saw it at Shafer's plant.

Q. When you actually saw it at Shafer's?

A. Yes.

Q. But you have no independent means of fixing the date when you saw that?

(Testimony of Louis H. Klein.)

A. No, I am sorry; I don't.

Q. Now, I'd like to show you what purports to be a rough dipstick assembly and will ask if, as you see it, it corresponds approximately to the device that was made up, utilizing [530] the first cut made on your table saw.

A. With the square cuts?

Q. With the square cuts.

A. No, this has a radius.

Q. That has a radius?

A. Yes, this has a radius.

Q. You recognize that as a radius cut, do you?

A. (Nodding in the affirmative.)

Q. I now show you Defendant's Exhibit H and will ask if that particular sample corresponds, as far as the wood is concerned, to the first cut made on your table saw.

A. This is not on the radius. This is a square cut.

Q. Does that correspond approximately to the cut that you produced?

A. The first one, yes, sir.

Q. At Mr. Welch's request. Now, I assume that after the cut had been made you tried the assembly of the device?

A. Well, as I remember, Mr. Welch was standing on the opposite side of the saw and whenever I made one, he would take it and do the actual trying, because he was the sole judge of whether it was satisfactory or not. I was just cutting it.

Q. And was this just a matter of accommodation or were you a salaried employee at that time?

(Testimony of Louis H. Klein.)

A. Well, Mr. Welch was not in a position to pay anything [531] at the time, so therefore I made no charge. And had he been in a better condition, I would have made a charge and you would have had some definite dates because they would be in my books.

Q. Now, I assume—let me ask you this: As a result of the cuts that you were making on this initial occasion on your table saw, was one produced that satisfied Mr. Welch at the moment?

A. Yes, he went away satisfied.

Q. He went away satisfied. And the wood in that particular one as to which he expressed satisfaction corresponded to this particular exhibit?

A. No, this is a hardwood.

Q. I don't mean as to the composition of the wood.

A. Oh, you mean the cross-section?

Q. As to the cross-sectional aspect?

A. Yes, that's right.

Q. And I was showing you Defendant's Exhibit H for identification.

Mr. Naylor: We will offer this at this time as an exhibit, as Exhibit H, it having been previously merely identified.

The Court: Let it be received.

The Clerk: Defendant's Exhibit H in evidence.

(Whereupon, Defendant's Exhibit H for identification [532] only was received in evidence.)

Q. (By Mr. Naylor): Now, in connection with

(Testimony of Louis H. Klein.)

the dipstick, Mr. Klein, did you make any drawings on behalf of Mr. Welch?

A. Yes, I made a drawing of it.

Q. Did you make a drawing of the parts or the assembly of the parts?

A. As I recall, I made an assembly, a cross-section, and showing the wooden filler by itself.

Q. Could you tell us approximately when this drawing was made, to the best of your recollection?

A. I am sorry, I can't. It would have to be before the radius cut was made.

Q. Why do you say that, sir?

A. Well, because I drew it as a square cut.

Q. You drew the sticks as you had cut them?

A. On this drawing, yes.

Q. I see. And would you date it, then, before you saw the radius cut sticks at Shafer's Mill?

A. Yes, I would.

Q. Mr. Klein, I will hand you what purports to be an original pencil drawing and will ask if you can identify that?

A. Yes, that is the drawing I made.

Q. Now, does that drawing show the square cut that you [533] have been describing to the Court?

A. Yes, it shows the square cut.

Q. And does it show the small tubes?

A. Yes.

Q. Does it show a larger outer tube?

A. Yes.

Q. And does it show those four pieces in assembled condition?

(Testimony of Louis H. Klein.)

A. Yes, it's right here in my broken section.

Q. Is that at the center of the drawing?

A. That's right.

Q. And are the parts, or rather, were the parts labeled by you?

A. Yes, I did the complete drawing with the exception of this signature, print number and the date down here.

Q. Everything else on the drawing was prepared by you?

A. That's all in my style, yes, sir.

Q. Now, is there anything on the drawing, disregarding the signature, the date and the print number to which you have referred, that dates the drawing as far as you are concerned?

A. Yes, I would say that it's the matter of the square cut there.

Q. And why do you say that?

A. Well, it's because I am a perfectionist and had this [534] wood been radiused at that time, because I had something to do with it by sending Mr. Welch to have a radius cut, I certainly would have made that radiused and not square.

Q. But it is definitely square in that drawing?

A. Yes, sir, it is square.

Q. Now——

A. And in two places, not only in the cross-section but down here in isometric view of the end it shows it in a square.

Q. Yes. Now, I notice that certain numerals and figures have been placed on certain parts of that

(Testimony of Louis H. Klein.)

particular drawing. What do they purport to represent?

A. Well, it's just a scale, meaning no particular one, to show where the scales would be located.

Q. It is merely symbolic?

A. I would say that, yes, sir.

Q. Did those figures mean anything to you as far as a usable scale? A. No.

Q. Was it merely to indicate the location of the scale?

A. It was just—yes, the location and to show that that is a scale.

Q. Now, with reference to the date on the drawing, was that drawing dated in your presence or do you have any recollection? [535]

A. I don't think it was; I don't know.

Q. You don't know?

A. I really don't know.

Q. You have no independent recollection of the signature of the drawing? A. No.

Q. I see. Now——

Mr. Naylor: By the way, I would like to have that marked merely for identification at this time, your Honor.

The Court: Let it be so marked.

Mr. Naylor: Next in order.

The Clerk: Defendant's Exhibit R-1 for identification.

(Whereupon, drawing referred to above was marked Defendant's Exhibit R-1 for identification.)

(Testimony of Louis H. Klein.)

Q. (By Mr. Naylor): Now, beyond the cutting of the wood and the making of the drawing, Defendant's Exhibit R-1 for identification, did you have any further connection or have you had any further connection with the dipsticks as Mr. Welch's business developed?

A. Oh, yes, I helped assemble a lot of them, and I made gadgets to cut down the labor cost and I even talked myself out of a job by suggesting that he get boys to make the assembly because the rate was not as high as mine.

Q. And what kind of gadgets did you mean to indicate?

A. Well, in putting the small tubes into the square tube, [536] the first one was to make a spring device that would hold it over into the corners until the plastic binder or adhesive took hold and held it in there.

Q. Is that like a jig?

A. Yes, you could call it kind of a hand jig. And then later on in the development I built a press that would put the plugs in, press them into place and at the same time give the accurate spacing at the bottom and the top that was required, according to Mr. Welch's specifications.

Q. Yes. Now, anything else that you can recall?

A. Well, I built a shop for him to accommodate the manufacture of these.

Q. And approximately when was that, sir?

A. That was just before I went with the School District. It was in the early part of '52.

(Testimony of Louis H. Klein.)

Q. Now, was there anything else appertaining directly to the dipstick that you can recall that you had a hand in doing?

A. Well, Marty was always coming over with various little problems and we worked on them together. There were so many of them I don't think I can recall them all.

Mr. Naylor: Excuse me, your Honor.

No further questions on direct.

Cross-Examination

By Mr. Swain:

Q. Mr. Klein, is there anything in [537] connection with those checks, gasoline receipts that you have produced that definitely identifies that as the trip immediately preceding Mr. Welch's visit to you with the dipstick?

A. Well, except that from my recollection that it was after that trip from Los Angeles. It was a few days after that.

Q. How frequently do you go to Los Angeles?

A. The previous trip, I think, was a year—at that time I probably went down, oh, it wasn't every year.

Q. Just what did Mr. Welch bring to you at the time of this first visit?

A. As I recall, it was the three pieces of plastic tubing

Q. And those three pieces would be a square outer piece and two tubular pieces?

(Testimony of Louis H. Klein.)

A. That's right.

Q. Was there any wooden filler to go in there?

A. I don't recall whether there was or not.

Q. What did Mr. Welch tell you about the necessity for a filler?

A. Well, he explained to me what the thing would do when finished, the general idea, and that that wood filler would keep the tubes in place and also strengthen the tube to keep it from warping.

Q. And was this wooden filler to have any other function? A. To hold the scale.

Q. Did he explain the nature of the scale to you? [538]

A. No, I don't think at that time he had that completely formulated.

Q. Did he explain the paper scales which were to be secured to the wooden filler?

A. No, I believe that was a later development.

Q. Is it your recollection, then, that the scale was to be applied directly to the wood by means of ink or printing or something of that sort?

A. It could have been, yes.

Q. But you are not sure?

A. No. My problem was only to make the wood that would hold the tube in place.

Q. And that was to be a relatively tight fit?

A. Yes.

Q. And as I understand your testimony, you simply took a square piece of wood and cut out square grooves in opposite corners?

A. That's right.

(Testimony of Louis H. Klein.)

Q. And that's all you did? A. M-hm.

Q. Was nothing else done to this wood?

A. No, I believe he actually cut it to the proper length.

Q. Was there any attempt made to develop a slight curvature on the other sides of the wood so they would correspond to the inner curvature of the square tube? [539]

A. No, because my equipment is very limited and it couldn't possibly make that kind of a cut.

Q. You appreciate the cut to which I am referring? I am referring you now to your exhibit, or rather, to Defendant's Exhibit Q-1, and I am referring to these opposite corners. Were they curved in any manner? A. These?

Q. Yes.

A. I don't think they were. I can't recall, unless—if he took some sandpaper to smooth out the main surfaces, he would naturally smooth those over a little bit, too.

Q. But I thought that he was testing them for tightness as they came off the other side of the saw.

A. Well, he could be taking a piece of sandpaper and working on it, too.

Q. He could be, but you are not sure that he was, are you? A. No.

Q. Now, isn't it true that the inner surface of this square tube has a slight curve on opposite corners?

A. The inner surface of the plastic tube?

(Testimony of Louis H. Klein.)

Q. Yes. A. Yes, it does have.

Q. The piece which ultimately satisfied Mr. Welch, I understand, was a rather tight fit?

A. M-hm. [540]

Q. Was any test made in your garage as to tightness, or how did you determine it was a tight fit or a sufficiently tight fit?

A. Well, he laid the two tubes, the smaller ones, into the grooves and pushed them into the main tube, and if it stayed there, that was it.

Q. Was there any attempt made to shake them out, or did you just push them in?

A. Well, yes, if it came out by shaking, it wouldn't be any good. It had to fit in there tight.

Q. Well, would you say that they fitted about as tightly as this Exhibit H, which I am handing you?

A. No, there's a difference in this, because, as you pointed out, there is a radius to the tube itself and this wood has been radiused out on the outside also to take care of it. However, if you are interested, and I believe we were at that time, just so that these things didn't come out, the tube would be supported at these two points, and out here, and it wouldn't make too much difference about out here on the face.

Q. In other words, in this Exhibit H, by virtue of the opposite corners being slightly rounded to increase the friction engagement between the side edges of the filler and the inner area of this outside square tube, is that right? [541]

A. Yes, you have more contact surface there.

(Testimony of Louis H. Klein.)

Q. And if you did not have those radiused corners, but simply shoved it in, then your principal points of contact would be on the corners of the wood filler and the tube? A. Yes.

Q. And a dipstick constructed in that manner, or rather, in a dipstick constructed in that manner, a wooden filler would more easily come out, wouldn't it, because there wouldn't be so much friction engagement there to hold it in place?

A. No, it wouldn't come out because it would be wedged in there.

Q. Now, who suggested to you the form of the filler which was to be put into this dipstick?

A. Mr. Welch did.

Q. And who suggested the utilization of end pieces or plugs as shown in Exhibit R-1?

A. That I can't say exactly. It was either Mr. Welch or someone that he had previously been talking to, because that wasn't my problem.

Q. Did Mr. Welch bring another drawing over to you at the time he first made his first visit?

A. I couldn't swear to it. I don't believe he did, though.

Q. Do you recall whether he brought any sketches or made any sketches in your presence? [542]

A. No.

Q. Can you tell from looking at this drawing just what these plugs were supposed to represent?

A. Yes, they would make it—they would fill it up so that the fluid wouldn't get inside between the wood and the inside plastic.

(Testimony of Louis H. Klein.)

Q. Is there any indication on this drawing as to how these plugs were to be made?

A. Not by my sketch, no—just this.

Q. Any indication whether they were made up of several laminations or a single piece of material?

A. No, that was a later development of his. I do recall that we made a few of them where we put the “goop” as we call it, all in at once, and then tried putting it in just a little bit at a time.

Q. Well, is this a plug?

A. That is considered still a plug.

Q. Then was this plug which is shown here supposed to indicate a mass of cementitious material which is shoved in there and allowed to dry, or is it supposed to represent a plastic plug or plate, we might say, which was shoved in and cemented in place.

A. Well, at the time I made this drawing, I would say that there were no actual details available of what he was going to do because I haven't gone into detail of what that plug [543] is.

Q. These lines, these parallel lines in the plug, and—do they indicate anything in particular to you?

A. No, they are just shading.

Q. Is the manner of showing a cross-sectional view at the center of the drawing, entitled “General Details,” approximately full sized, a customary way of showing a cross-section?

A. That seems to be my own brand of doing things. All designers have their peculiarities.

(Testimony of Louis H. Klein.)

Q. And that's one of yours? A. Yes.

Q. Who suggested the valve control model which is shown on this exhibit? I had better give it to you so you will have it.

A. Oh, Mr. Welch came up with that.

Q. What is it supposed to represent?

A. Well, the possibility of having some sort of a valve on there that would do it better than keeping the finger on it, because very often something of this type when it is lifted up, a person is apt to take his finger off, and of course the fluid will go right out.

Q. So you provide, then, either for a valve in the top or bottom?

A. This says, "Valve in top or bottom." See, this was just [544] an idea or a possibility.

Q. Do you know what the legend, "Print No. 5" in the lower lefthand corner of that drawing means?

A. It's some designation that Mr. Welch or someone else put on there. It's not my writing and not in my printing.

Q. And how about the notation, "Invented by"; who put that on there?

A. The "Invented by" is my lettering.

Q. And the date, 12 May, 1948?

A. That's someone else's.

Q. You don't know whose? A. No, sir.

Q. It wasn't put on in your presence?

A. No, sir.

Q. And you didn't initial this drawing anywhere or indicate any date that you made it, did you?

A. No, sir, I didn't.

(Testimony of Louis H. Klein.)

Q. Did Mr. Welch suggest the legend, "Liquid column type measuring gauge" at the top of the page?

A. Kind of sounds like my wording. Outside of that I couldn't say.

Q. You don't know whether Mr. Welch suggested that? A. No, I don't.

Q. How long after Mr. Welch first approached you did it take you to produce that drawing, the exhibit that you have in [545] your hand?

A. You mean if I were doing it at one sitting, how long would it take me to make this drawing?

Q. No; excuse me, Mr. Klein. I mean how long did it take you or what period of time elapsed from Mr. Welch's first describing the dipstick to you and your production of the drawing?

A. I am sorry; I couldn't give you an answer on that. I wouldn't know.

Q. Well, do you think it took you two or three days to produce that drawing or did you do it the very evening he came over?

A. That sounds more logical, because this isn't a time consuming drawing.

Q. Well, what sounds more logical? I asked a double barreled question; I am sorry.

A. Well, that I did it in a short time. He could have come over and asked for it and I probably didn't spend more than an hour and a half or two on the thing.

Q. In the completed dipstick—Excuse me; strike that. Can you describe to me the condition of the

(Testimony of Louis H. Klein.)

dipstick when Mr. Welch left your premises after you had succeeded in making a satisfactory filler?

A. You mean the first one?

Q. Yes. [546]

A. With the square cuts?

Q. Yes.

A. No, except that he went out of my shop with the thing assembled.

Q. Did it have any end plugs in it?

A. Oh, no.

Q. Did the wood extend from one end of the outer tube to the other? Was it flush or was it slightly indented?

A. I couldn't say because, as I recall, Marty cut it to his own length. The reason I did the actual cutting on my table saw is I don't trust very many people to work it, and whenever Marty has come over to work on something in my shop, or any other neighbor, if I think he has the ability to work a certain equipment, why, he can use it. But the saw is a little different story. I generally handle that myself.

Q. Well, then, knowing that, do I understand that Mr. Welch, however, did determine the length of this piece of material?

A. Yes, I am sure that he probably went over to the miter box, or I will say that he did go over to the miter box and make the cut which would determine the length of it.

Q. And you don't recall whether the filler was the same length as the tube or not, do you, sir?

(Testimony of Louis H. Klein.)

A. No, I wouldn't recall that. [547]

Mr. Swain: That's all, your Honor.

Mr. Naylor: No further questions, Mr. Klein.

(Witness excused.)

Mr. Naylor: Mr. Welch, please.

C. MARTIN WELCH

resumed the stand in his own behalf.

Direct Examination

(Continued)

By Mr. Naylor:

Q. Mr. Welch, Mr. Swain called my attention to the fact that one of the dipsticks that I had handed him for inspection had not been identified nor introduced. I will now hand you that particular dipstick and ask if that is a part of the collection that you made in seeking the competitive structures?

A. No, this is a dipstick I remember as having been around my basement for quite a long period of time.

Q. Do you know the origin of the stick?

A. Yes, I do. I picked it up at Trans World Airlines in Kansas City, Kansas.

Q. And approximately when?

A. I have no way of establishing the date, Mr. Naylor. I made trips to Kansas City in '49, '50, '51—three successive years, after initiating or trying to initiate business. Those three years I am positive of. It was on one of those trips, definitely. I don't

(Testimony of C. Martin Welch.)

believe I went in '52 to Kansas City or in '53, but for three years in a row [548] I made successive trips around the country.

Q. And it was on one of those trips that you picked this particular stick up? A. Yes.

Q. Do you know the mode of operation of that particular stick?

A. Well, this one has a Schrader type valve on the end of it. It is a valve similar to the one you have in your automobile tube, inner tube. And the principal of this one is to insert it, and it is, incidentally, calibrated for a Constellation airplane. You insert it into the bottom of the tank and push down on the valve, and thus cause the fluid to rise in the tube, take pressure off and then the valve, which is spring-loaded, closes (indicating).

Q. You called attention to the fact that the valve was at the bottom of the stick.

A. That's correct.

Q. How do you establish that? Is there anything to indicate that on the stick?

A. The configurations would indicate it, Mr. Naylor. The bottom scale being 600, the top marking being 1,550, or the top marking being "Full" and below that "1,550 gallons," and the increment change rate is in 50 gallon increments, which would definitely indicate that as you go to the tank and it was up here, if you had trapped that much fuel in it, [549] you would have 1,550 gallons that I speak of. It is definitely on the bottom of the stick. It's a dipstick that Trans World Airlines—now,

(Testimony of C. Martin Welch.)

again, I say I have no way of establishing when I picked that up. I did pick it up in Kansas City. It is a stick that they had in operation at the time and for some time prior to that, and until rather recently—I say “recently,” ’54 or ’55, 1954, or ’5— they used this type stick. Even though this stick, by their estimate, the cost factor on the stick on making these was considerably more than the cost of purchasing my stick, they chose to use this type for one reason alone, and that was because someone in their safety department found that under the most ideal conditions relative to humidity and everything else, and with a particular type of cloth, he could rub the dipstick a number of times and in rubbing it, create a static charge enough to ignite a vapor bomb. So he thus recommended through their safety engineers or through their safety department that they not purchase my stick unless we put something in it to release the static charge, which, when I say “something in it,” that could be a strip of foil the length of the tube.

Q. But you picked this up at TWA?

A. Yes. I might also call your attention to the fact that—I don’t know what type metal this is but it is metal in the bottom of this stick. [550]

Q. You were speaking of the valve mechanism at the bottom of the stick? A. Yes.

The Court: May I see it?

Mr. Naylor: Excuse me, your Honor.

A. (Continuing): It is a machined screw. I don’t know of what metal alloy or composition.

(Testimony of C. Martin Welch.)

doubt very much if it is aluminum. Seems to be chromed, whatever material it is.

Mr. Naylor: We will offer that as a final dipstick to illustrate the witness' testimony, your Honor.

The Court: It may be received.

The Clerk: Defendant's Exhibit S-1 in evidence.

(Whereupon, dipstick with valve assembly referred to was received in evidence and marked Defendant's Exhibit S-1.)

Q. (By Mr. Naylor): Now, you have previously mentioned that you called on your neighbor, Mr. Klein, for some assistance in relation to the wood section of the dipstick at the time of the initial contact that you had with it. A. M-hm.

Q. As I understand it, you received from Mr. Kerr an assembly, is that correct?

A. That is correct; an assembly consisting of four parts—three pieces of plastic and one piece of wood.

Q. Now, were you satisfied with that particular assembly [551] in all details?

A. No; if I had been, I wouldn't have found it necessary to go and ask Mr. Klein to mill out another piece of wood for me.

Q. What was the specific reason for your dissatisfaction with it in any respect?

A. As I recall, the main reasons that I was concerned with it were, on the wooden filler or spacer set up by Mr. Kerr, it was very loose in the stick.

(Testimony of C. Martin Welch.)

It wasn't a tight-fitting piece, and the surfaces whereon I knew calibrations in some manner would have to go, even then, naturally, I would know that calibrations would have to go on there in some fashion, whether you stamped them on, painted them on or put paper on it or what. I don't recall how they were supposed to go onto it. And I took—let me put it this way: To the best of my recollection, I assumed—I can't see why I would have removed the spacer. I assume I took it over to Mr. Klein, but by the same token it is perfectly logical for me, if I wasn't satisfied with it, to have taken it out and walked over to him with the three pieces and told him exactly what I want. I don't think there is much of a controversy that exists there as to justification for doing it.

Q. Do you have any positive recollection one way or the other as to whether you took the total Kerr assembly? [552]

A. I seem to recall I did take it all over there. Mr. Klein has testified differently. I have argued with him several times before. I could never convince him of anything, I am sure.

Q. What specifically did you ask Mr. Klein to assist you with?

A. To make a wood assembly that would meet the requirements at the time I knew were necessary.

Q. And how long a period of time did it require for Mr. Klein to cut a piece of wood that was satisfactory to you for that purpose?

A. I have no way of knowing, Mr. Naylor. I

(Testimony of C. Martin Welch.)

know that he cut possibly a half dozen parts, so—as he got onto the job—when I came over, he dropped what he was doing and did it for me. But in the interval between when he started and completed it, I have no way of knowing. It could have been anywhere from an hour or half an hour to two hours.

Q. What I am getting at, did it take days or weeks or what? A. No, that evening.

Q. Was it all done in one evening?

A. Yes, the wood part he made for me just (snapping fingers)—within a couple of hours or maybe within 15 or 20 minutes, but how long I can't tell you. I walked away [553] with the completed part, satisfied with it.

Q. You walked away with the completed part?

A. Satisfied that it was something I now could show to Pan American.

Q. Did he hit it on the first try?

A. No.

Q. Or were there several?

A. No, no, he reset his saw blade several times.

Q. And what did you do while this was going on?

A. Well, I stood across from him, as he said, and tried the wood until I was satisfied with the fit and with the dimensions of it.

Q. And you finally walked out with one that was satisfactory? A. That's right.

Q. And was that the assembly that you eventually delivered to Pan American as a sample?

(Testimony of C. Martin Welch.)

A. That was exactly the sample and the only sample that was furnished Pan American during the months of May and June, prior to getting more tubing in July. It is possible I could have taken another sample out to them in July. Not probable—it is not likely, because I think I walked over with the first production parts in August. But it is possible.

Q. Now, Mr. Klein cut the cross-sectional aspect of the wood filler. Did you do anything to any part of the stick while you were at Mr. Klein's? [554]

A. I don't recall ever cutting it to length, but I may have.

Q. But the result was that you walked out with something that was satisfactory to you?

A. I definitely left his shop after it was completed and cut the way I wanted it.

Q. Now, Mr. Welch, I would like to show you defendant's Exhibit R-1 for identification, which is the drawing to which Mr. Klein referred.

Mr. Naylor: Does your Honor wish to take the afternoon recess?

The Court: Yes, as soon as he identifies that.

The Witness: I can identify the drawing.

Q. (By Mr. Naylor): Did you ask Mr. Klein to make this drawing for you?

A. Yes, I asked him to make the drawing for me.

Q. Did you have any other drafting facilities at your call at that time?

(Testimony of C. Martin Welch.)

A. Only those that may have been offered me, assistance that may have been offered me by Mr. Grindle, the facilities at Pan American. I don't recall.

Q. You didn't have any independent draftsman?

A. Oh, no.

Q. That you recall?

A. Answering your question directly, no. [555]

Q. And was this request to Mr. Klein a matter of accommodation or was it a job to be done for hire?

A. I couldn't afford at the time to have hired him. It was an accommodation job on his part.

Q. An accommodation job, you say?

A. I had no money to hire him with. As a matter of fact, I was working for him not too far previous to this time, drilling out castings on his machine lathe.

Q. Now, were you present when Mr. Klein made this particular drawing?

A. I would say I was there with parts of it or possibly all of it, when all of it was made. I have a faint recollection of being on hand and explaining to him various things about the drawing, yes.

Q. How did you start the ball rolling on the making of this drawing by Mr. Klein? Did you supply him anything or did you just tell him, or both?

A. That's awfully difficult to remember, Mr. Naylor. I could express logical reasoning, but I couldn't safely, soundly say I remember giving him a sample. It is logical that I would have described

(Testimony of C. Martin Welch.)

it to him. Maybe even made a sketch or two, although—I don't know. I can't remember.

Q. Now, do you have any means of fixing, according to your own recollection, the approximate time when you first saw Defendant's Exhibit R-1 for identification in the [556] completed form in which it now appears?

A. I can only approximate it as being around June of '48, and I arrive at it solely because I know Mr. Klein real well and when he says he is a perfectionist, he is—quite. He is a perfectionist and he couldn't have made this drawing after the radiused wood—that shape—was milled. He couldn't have made it before the 12th of May, so he made it in that interval or period.

Q. Now, I call your attention to the fact——

A. I can't establish when.

Q. Beg pardon?

A. I cannot establish when. Some time in that period of time.

Q. All right. Now——

A. Approximately.

Q. I call your attention to the fact that this drawing purports to contain a signature and a date and——

A. It is my handwriting, the signature and date. The address is my address, the time was—at that time it was 55 New Montgomery. It still is.

Q. Now——

A. "Print No. 5" in the left-hand corner is also my writing.

Q. I will come to that in a minute. Let's take

(Testimony of C. Martin Welch.)

the matter of the signature and date first. According to your [557] recollection, did you actually sign that drawing on May 12, 1948?

A. Oh, no, definitely not.

Q. You did not? A. No. [557-A]

Q. How can you say that? I mean, on what do you base that?

A. Well, I know that no drawing was made on the 12th. A sample was made on the 12th, but no drawing was made on the 12th. I can go a little bit further and say that I doubt if I was aware on the 12th of May, I doubt very much if I was aware that plugs were required, as such. I wasn't aware of that until well into the latter part of May, possibly even the very first few days—one or two or three—into June.

Going further, the valve suggestion is something I discussed with Mr. Grindle on about the first order for dipsticks, and that wouldn't have been done on the 12th of May. The 12th of May represents the day that we made the first sample; it is the date I put on there when I signed the drawing, whatever date the signature was I don't remember. I do not recall.

Q. You can't then fix the actual date of signature?

A. I cannot do that. The date, May 12 date, is the day that the embodiment contained in the drawing was conceived, specifically, the two round tubes, the square tube and the wood. As to the plugs, that did not relate, I believe, to plugs, because I remem-

(Testimony of C. Martin Welch.)

her very distinctly I wasn't aware the plugs were required initially—that is, on the 12th of May, let us say.

Q. Yes. Now is it your testimony, then, that the date May 12, 1948, is not intended to indicate the actual date of [558] your signature to the drawing but is to indicate some other event?

A. It most definitely indicates the——

Q. Rather than the signature?

A. ——conception of the main parts displayed on the drawing. May the 12th further establishes that I made the assembly, the initial assembly, around or on the 12th of May.

Q. Now you mentioned the words "Print five." Will you explain to the Court, if you can, the significance of that phrase?

A. I have been asked that before, and outside of an imaginary attempt at—I don't know. I can't tell you why I put it on. I was going to say an imaginary attempt at adding prestige, to the fact that maybe we made a whole bunch of drawings. But there was only one made at the time. There wasn't five made.

The Court: Let's take the recess now.

Mr. Naylor: Thank you, your Honor.

(Recess.)

Q. (By Mr. Naylor): I think we had just about concluded the discussion of that particular drawing.

(Testimony of C. Martin Welch.)

Mr. Naylor: We will offer that original drawing, your Honor, as defendant's next in order.

The Court: It may be received.

The Clerk: Defendant's Exhibit R-1 in [559] evidence.

(Whereupon, drawing referred to above was received in evidence and marked Defendant's Exhibit R-1.)

Q. (By Mr. Naylor): Mr. Welch, will you be good enough to look in Mr. Vale's file, Defendant's Exhibit H-1, and see if there is in that file a print of any kind of the Klein drawing you have just been discussing?

A. Yes, a duplicate run from that vellum is in his file.

Q. And to what is it attached?

A. Attached to somewhat of a descriptive letter that I had and can recall of having used probably the first part of 1949.

Q. Now——

A. Giving advantages of the dipstick, describing advantages of it.

Q. Do you recognize that as material handed by you to Mr. Vale during the time that you were discussing the matter of the patent application?

A. It had to be, Mr. Naylor, yes.

Q. Now in the Vale file do you find any other print of a drawing of any kind?

A. There's another drawing at the end of that one, and immediately I recognize it as a drawing

(Testimony of C. Martin Welch.)

covering the calibrations for the Boeing dipstick.

Q. The Boeing Aircraft?

A. It is dated—it is drawn by G. Boyle and dated [560] February the 4th, 1948, but that date has to be in error, because my name is on this drawing.

Q. Were you manufacturing dipsticks in February, 1948?

A. No, had nothing to do with them. Didn't even know anything about a plastic dipstick at that date. It must have been intended to be 1949.

Q. Does the subject matter of the drawing itself age-date it to you?

A. I would say it does definitely represent itself as possibly the first or among the, let's say, the calibrations on it are of a type that we used on the first order for Pan-American for the Boeing dipstick. which reference to my files would show that we made and delivered in February of 1948 or in March of——

Q. '49, you mean? A. '49, excuse me.

Mr. Swain: Mr. Naylor, we will stipulate that that drawing is a year off. We noticed the same error.

Mr. Naylor: Thank you, Mr. Swain. That concluded the interrogation on that.

Q. Will you restore these to the approximate place in the Vale file at which you found it, please?

A. I find another.

Q. You have shown me another print. Is that a print——

(Testimony of C. Martin Welch.)

A. Another blueprint copy of the—this is the blueprint [561] and the other one seems more like a—this is a blue line print, but it is run off the same vellum, identical, of the drawing made by Mr. Klein.

Q. Now among the material that you find in the file, is there a calibration chart sample?

A. There's one that I certainly must have given—I had to give Mr. Vale; that being a bottom sheet, it is not labeled and I can't identify for which particular aircraft it might have been. It undoubtedly was given to him at his request for a piece of paper—the other lacks a calibration—that had the calibration on it.

Q. I see.

A. I haven't gone through this (examining file).

Q. I see you have an envelope. Will you ascertain whether the envelope has any contents?

A. They represent the first plugs we made for dipsticks, yes.

Q. Were those plugs for laminated type of closure?

A. They were for the laminated type of closure, yes.

Q. I see.

A. This is not my writing. It appears to be his. It is similar to his style.

Q. You have no knowledge of it? A. No.

Q. Thank you. Now you were present, were you not, when Mr. [562] Grindle was testifying concern-

(Testimony of C. Martin Welch.)

ing the conference in the offices of Flehr and Swain?

A. I was, sir.

Q. And you recall the approximate date of this, do you?

A. Approximately Wednesday, the 8th of February.

Q. Of what year?

A. Oh, when you ask, you meant when was I present in this court?

Q. Yes.

A. Approximately the 8th of May, 19—the present, current year.

Q. Here in court, you are talking about?

A. Yes. Is that what you had reference to?

Q. No. I had reference to the dating of the Flehr and Swain office correspondence.

A. Oh, I recall that as being, as having taken place in 1954. I can't be sure about that—could have been early '55 or late '53, but it seems to me like 1954 would be the year.

Q. Now you were accompanied by whom?

A. Mr. Bruce Fratis, who had been at the time my counsel on legal matters.

Q. And as I understand it, Mr. Flehr?

A. Mr. Flehr was present, Mr. Hohbach and Mr. Grindle, Mr. Fratis and myself, yes. [563]

Q. That was the total attendance?

A. That's correct.

Q. And the purpose of that conference was to explore the possibilities of amicable compromise?

(Testimony of C. Martin Welch.)

A. That's right, it was brought about by the suggestion—so told me by Mr. Fratis—of Mr. Hohbach.

Q. Now, Mr. Grindle attributed to you words and suggestions of a threatening nature. What about that? Did you threaten Mr. Grindle with a suit.

A. He was quite dramatic about it. I didn't.

Q. Did you threaten him?

A. I didn't threaten him with any suit at all.

Q. Did you use words, "I will sue you," or words of like import?

A. No, I definitely did not.

Q. Did you use words having reference to injunctive relief or any such phrase?

A. I am sure that Mr. Grindle, Mr. Hohbach and Mr. Flehr know exactly what I said in conjunction with that. I can repeat it to this day and can again.

Q. I wish you would repeat it. What is your recollection of the way the question was put to you by—was it Mr. Flehr who put the question?

A. Mr. Flehr, yes, proffered the question to me on several occasions, as I recall, but whether or not that is [564] important or not, I don't know. On several occasions during the last part of our trip there, he asked me, or maybe he asked me twice, immediately one after the other, if I would agree to Mr. Grindle manufacturing dipsticks. I do not remember his wording as such. It was similar to that. And I told him there were two drawings, again the principal drawings of the Pan-American Airways

(Testimony of C. Martin Welch.)

correspondence with Boyle, Kiester and Fox, I identify them as the A drawing and the B drawing produced in court here.

Q. Do you have reference by that to Plaintiff's Exhibit 6 and Plaintiff's Exhibit 8?

A. If you have to read the exhibit numbers correctly. Yes, those are the two drawings I have reference to.

Q. Were those drawings referred to during the course of the conference as Flehr and Swain's?

A. Quite extensively, I would say, yes. They were laying on the desk and I had a sample with me of the dipstick. As I recall, I pointed to this dipstick, to the one drawing, and said, "Mr. Grindle can make all the dipsticks he likes patterned after that drawing."

Q. And which of the two drawings did you refer to?

A. I will further identify it by saying it is Defendant's Exhibit (indicating)——

Q. The small one?

A. The small drawing, yes. [565]

Q. 6? A. 6.

Q. And——

A. And then I moved the stick over to the other drawing and said, "I will enter into no agreement with Mr. Grindle to make sticks based on this drawing."

Q. And did you emphasize that in any way by threat of litigation, lawsuit, action or otherwise?

A. I don't recall as I raised my voice. I cer-

(Testimony of C. Martin Welch.)

tainly didn't say any more than that. That is all I said, Mr. Naylor.

Q. Is that your best recollection of what transpired in that particular aspect of the conference?

A. Concerning that particular aspect of it, that would be exactly what transpired as far as I am concerned.

Mr. Naylor: That concludes the direct examination, your Honor.

Cross-Examination

By Mr. Swain:

Q. Mr. Welch, who referred Mr. Grindle to you in the first place, do you recall?

A. Yes; I do, Mr. Swain.

Q. Who was it?

A. John Robb, of American Molding Company.

Q. Did Mr. Robb get in touch with you to say he was referring anybody to you?

A. Not as I recall presently, no. He may have. I thought [566] that Mr. Grindle explained to me that he was sent over, or sent to me, referred to me by American Molding Company, and in the later course of events it was through conversation with Mr. Robb, I determined that he was the person—the individual that had referred me to Mr. Grindle.

Q. Did Mr. Grindle first communicate with you or did you communicate with him?

A. He first communicated with me.

Q. And when you went to see Mr. Grindle, what

(Testimony of C. Martin Welch.)

did Mr. Grindle have on his desk to show you other than the dipstick which you have referred to as having the pockets in the sides? Did he have any other type of dipstick?

A. The drawing, a drawing he had.

Q. Do you recall—

A. I seem to recall he had a wooden type dipstick the likes of which they were currently using at that date, and had been using at that date.

Q. He had only a drawing then other than—

A. He had a drawing of this particular extrusion. He did not have a sample with him at that time similar to that drawing, no, Mr. Swain.

Q. This is Plaintiff's Exhibit 6 to which you are referring?

A. Plaintiff's Exhibit 6, that's correct, yes.

Q. Did Mr. Grindle tell you that there was a dipstick in the process of being made? [567]

A. Seem to recall he did, that when completed I could pick it up, and I believe I recommended he forward it right to Los Angeles.

Q. Did he tell you where it was being made?

A. He may have said his shop; I don't recall.

Q. By "his shop," you mean Pan American's shop?

A. Yes; the plastic department, possibly. I couldn't honestly say whether he told me that or not.

Q. Did he tell you whether the model was very nearly completed or just started, or did he tell you anything like that?

(Testimony of C. Martin Welch.)

A. I thought that the model was in the final stages of being completed.

Q. Prior to this time?

A. I seem to recall that, but it is rather hazy, to give you my——

Q. Prior to this time had you had any experience with dipsticks?

A. None whatsoever with aircraft dipsticks.

Q. Did you have any experience with other types of dipsticks? A. Yes.

Q. What types?

A. Same type of experience, Mr. Swain, that the average person would have when we check our oil in our car and something like that.

Q. But nothing in a liquid column dipstick, let us say? [568]

A. No; none whatsoever.

Q. Tell me in some detail, if you can, what Mr. Grindle told you about this dipstick at this first conference.

A. That's pretty hard to recall, Mr. Swain.

Q. Well, tell me what you can recall. Well, maybe I could help.

A. I couldn't put it in the exact words or anything. I can give you an idea of what transpired in the conversation out there, and it would be in my own words, not Mr. Grindle's, and it had to do with the—he informing me of the evaporation factor and possibly he informed me of the configurations on the wooden type he was showing me, becoming marred and scratched or scraped up on the filler

(Testimony of C. Martin Welch.)

neck of the fuel tank. But I wouldn't swear to that. He indicated to me then, if not about that, the reasons or several reasons why he was searching for a new type dipstick.

Q. Well, what were those reasons?

A. Well, as I mentioned, it was a group—out of a group; I can mention a group of reasons now I am familiar with, and it must have been a couple of those. One is, in a high, windy day, why, the evaporation factor is so terrifically high on the wooden stick that by the time you pull it out, the fuel level visible wet mark on the stick might be an inch or two below what it was.

Another reason I am aware of now and was aware of [569] reasonably shortly after coming in contact with the dipsticks, is that on a rainy day one would huddle out to the aircraft and huddle off the tank with a dipstick, maybe crouched in his coat here, and would wipe it off under his arms to get the wet mark off from the dipstick so he could then insert it in the tank and get another wet mark onto it.

Q. Did Mr. Grindle tell you that, do you recall?

A. I am giving you a series of things that he may have told me about, why he wanted a new dipstick. The other one is that the oily, greasy hands——

Q. Well, just a moment, Mr. Welch. I would like to stick as close as we can to things that you specifically recall.

A. I don't recall any of them. I can't recall ex-

(Testimony of C. Martin Welch.)

actly any one of those, no. I know that he gave me some reasons why; that I do recall.

Q. And what did he tell you about the construction of this dipstick that he wanted?

A. He was primarily interested in having us extrude the tubing for him as depicted in the drawing at that time.

Q. And did you describe this device shown in Plaintiff's Exhibit 6 to you? You are familiar with this, are you?

A. Yes, I am. He may have—I can't recall. He certainly didn't show it to me. I don't recall ever seeing that even in our Los Angeles plant.

Q. Well, then, when you left him, you weren't very much [570] enlightened, then, on the construction of dipsticks, were you?

A. I knew what was essentially desired from us, yes. I would assume so. And to refresh my memory, I have reviewed the letter, of course, as you would guess, several times, which indicates that he told me that the calibration charts were on this wooden stick, that was being sent down, and from that letter I could possibly get an assist to my memory also by saying that he told me that they were only interested in the tubing described in the drawing, not in me making the dipstick up for them.

Q. Mr. Welch, I hand you Exhibit E, which, as I understand it, is the first letter that was sent by you to the Los Angeles office, and I wish to point out certain things in there. Did Mr. Grindle advise you

(Testimony of C. Martin Welch.)

that the size of the walls could be no greater than 3/16ths of an inch in diameter?

A. Seems very logical he would have, yes.

Q. Well, let's get something straightened out. Was there anybody else at this conference beside you and Mr. Grindle?

A. Not that I recall.

Q. So that unless you knew this one before you went in, Mr. Grindle must have told you?

A. That is an assumption to be considered, yes.

Q. And prior to your visit, you were not familiar with dipsticks of the liquid column type? I believe you have testified to that. [571]

A. No.

Q. So then the remainder of that sentence relating to the mode of operation was apparently imparted to you by Mr. Grindle? A. Yes.

Q. And the fact that there was a wood section or going to be a wood section was imparted to you by Mr. Grindle?

A. Yes. Well, I wouldn't say that—I interpret here, I say, "Can you think of any substitute section in plastics?" So apparently it wasn't determined exactly that there had to be a wood section.

Q. No, but the fact that there was a wood section, which you indicated was going to be in the model—— A. Yes.

Q. ——that was told you by Mr. Grindle?

A. That would have to be, yes.

Q. And the fact that there were going to be

(Testimony of C. Martin Welch.)

graduated paper scales pasted on that wood section; that also came from Mr. Grindle?

A. I would say so, yes.

Q. Was it contemplated at that time that this device was going to have to be sealed in some manner against the introduction by hydrocarbons or gasoline into the scale?

A. Not that I recall. Apparently it wasn't set definitely that it was going to be a paper scale, because this—I would [572] like to stay a little longer on the one sentence—"Can you think of any substitute section of plastic?" I also seem to recall very definitely a metal filler for that—consideration of a metal filler.

Q. But there is no mention of a metal filler in here? A. There isn't in here, no.

Q. You refer to a wood section and then you refer to a plastic section? A. M-hm.

Q. That must refer to the same item, doesn't it?

A. Pardon?

Q. Wouldn't the plastic section and the wood section be the same element?

A. How do you mean, Mr. Swain?

Q. The first line of paragraph 4, you talk about a wooden section? A. Yes.

Q. The third line you talk about a substitute section. A. In plastic?

Q. Yes.

A. The two parts would be entirely different; if you had a plastic section, the hydrocarbons wouldn't bother it.

(Testimony of C. Martin Welch.)

Q. That's right, but you are thinking of substituting a plastic section for the wood section, are you not? A. Yes. [572-A]

Q. And about the plastic section would also be a paper scale?

A. No; you could imprint it.

Q. What sort of a scale would it be?

A. You could imprint the chart on it. It wouldn't necessarily have to be. You could imprint the figures, configurations on a plastic scale.

Q. You can, but the point is that in this letter you talk about a wooden section which can be substituted by a plastic section, but you make no indication of any change in the paper scale, do you?

A. No; not in this letter.

Q. What do you mean on the last line of that paragraph where it says, "Maybe a square tube enclosed on both ends or"——

A. Difficult to recall. I can give you a supposition that might have existed at the time. I don't know what I meant on this particular occasion.

Q. Well, let me ask you this: Could it mean, then, a square tube in which a graduated paper scale was positioned? A. It could.

Q. And the tube therefore would have to be sealed at both ends?

A. Assuming now that you intend for me to say that that's the only thing it could mean. I wish you would list some other things it could mean, too. [573]

Q. All right; I will list some and I will give you

(Testimony of C. Martin Welch.)

an opportunity. But that's what it could mean, isn't it? A. Yes. [574]

Q. All right. What do you think it could mean aside from that?

A. Well, it's rather a difficult way of ending a sentence, I know, or, rather, an odd way—ending with a question mark in the air, to explain what I mean by that. I don't know. But a square tube closed on both ends would, to me, become a rod. With orifices, possibly it would be a bar shape with orifices. It would be a multiple tube, I would guess you would call it, with a center section closed.

Q. Well, the only reason you close the ends is to protect something on the inside, isn't it?

A. I wouldn't agree to that. There can be other reasons.

Q. What other reasons?

A. Because I am leery of what you are trying to put in my mouth, Mr. Swain——

Q. Mr. Welch, I am not a skillful enough man to put something in your mouth.

A. O.K., go ahead.

Q. Why else would you seal the ends unless you are trying to keep the gasoline from getting up in there?

A. Well, Mr. Grindle's letter says that they sealed the ends because they wanted to reinforce the ends. It doesn't say anything about keeping the gas from going up, Mr. Swain.

Q. I am talking about this right here.

A. Well, let me say that you would reinforce

(Testimony of C. Martin Welch.)

the ends, [575] that that would be another reason to seal them.

Q. Now, it's my understanding, then, that after only a conference with Mr. Grindle and only after seeing this Exhibit 6 you were able to adequately describe a dipstick which was going to be sent down?

A. I didn't adequately describe it in here. I say nothing about the laminations on it or about the ends being closed on here. I don't read that in here. He could well have told me about the wood and must have told me about the wood filler, Mr. Swain—must have told me about the holes in the side. The drawing I could refer to as giving me enough information to adequately describe that dipstick with his advising me of paper scales and wood couldn't I?

Q. I don't know. I doubt it.

Mr. Swain: I move to strike my grauity, your Honor.

The Court: It may go out.

Q. (By Mr. Swain): Where, on that drawing do you find anything about a wood section?

A. Nowhere.

Q. Nor do you find anything about a graduated paper scale being pasted there? A. Nowhere.

Q. Where do you find anything about a substitute section that may be closed at both ends?

A. Nowhere. [576]

Q. Well, doesn't your letter pretty adequately describe this device which I am handing you, which is Exhibit 5?

(Testimony of C. Martin Welch.)

A. It describes it in this manner, that were I to be told about the wood filler and the calibration charts and given this drawing, I could have described the same thing, as I have in the letter—very simply.

Q. Without seeing the stick?

A. Without seeing the stick, very definitely. This, plus wood filler, is the stick.

Q. All right. Let me ask you, where is Mr. Grindle's office out there at Pan American Airways?

A. At that time it was in a room with the group of engineers. He didn't have an office as such that has been referred to here, but I think we recognize it as his office because regardless of whether there are eight or ten desks in it, it still was his office as well as the other eight or ten.

Q. All right. That's right, but it is in the hangar building?

A. Yes, it is; it is up above; the second floor in the hangar building.

Q. The second floor in the hangar building. And do you know where this dipstick was being made at Pan American Airways? A. No. [577]

Q. Did Mr. Grindle tell you where it was being made?

A. No; he may have mentioned that one was being made in the shop at Pan American.

Q. Wasn't there any suggestion that you go over and take a look at it?

A. No; absolutely not, Mr. Swain.

(Testimony of C. Martin Welch.)

Q. Weren't you even sufficiently curious to suggest that maybe you ought to go look at it?

A. Not necessarily. Wouldn't help me. I was mainly interested in getting the product in Mr. Kerr's hands in Los Angeles at that time.

Q. Now, I would like to go into the matter of the device which was returned to you by Mr. Kerr, and I believe you know what I am referring to. Would you describe that to me, what was in there?

A. Consisted of four units or pieces, three pieces of plastic tubing, and one piece of wood.

Q. And would you please describe the filler to me?

A. The wood filler?

Q. Yes.

A. The unit came assembled, the wood filler served to position the tubes in alternate corners, to position the round tubes in alternate corners of the square tube. At the time I assumed it to be a spacer. It seems to me, as I recall, it was rather loose in there. [578]

Q. And was it formed generally as shown in Exhibit H?

A. Pardon?

Q. Was it formed generally as the filler which is shown in Exhibit H?

A. I hadn't remembered that it was. I can assume now that it was, but I didn't recall recently that it had been of that exact shape. I interpreted it as a spacer bar only.

Q. Do you recall the testimony which you gave on your deposition?

A. Yes; very definitely; very vividly.

(Testimony of C. Martin Welch.)

Q. Do you recall what you said about the spacer bar at that time?

A. I said that it served to position the tubes, as I remember. I recall drawing a sketch showing a wooden spacer bar positioning the tubes, if that will help you further.

(Conversation among Court and counsel regarding location of deposition.)

Mr. Swain: In that event, your Honor, I would like to check with the reporter this evening and see if it has been filed with the Court and I will delay some of the examination which I wish to utilize the deposition for, if that is satisfactory with you, Mr. Naylor.

Mr. Naylor: Certainly.

Q. (By Mr. Swain): Now, at any rate, after receiving the Kerr device, is it my understanding you immediately went [579] over to your friend, Mr. Klein?

A. I believe we received the device in the city in my office, in San Francisco. It would have been on the occasion of arriving back home from the office during, possibly during the course of the end of the day, towards suppertime, that I went over to his house.

Q. And then when did you see Mr. Grindle next?

A. I saw him within the next several days. You can establish it through correspondence that has been entered here.

(Testimony of C. Martin Welch.)

Q. Can you establish it any closer than "several days"?

A. I would like to place it on the 14th, because the letter to our Los Angeles plant that has been presented as an exhibit states that "I will see Pan American this afternoon on the dipstick."

Q. And when you took that dipstick to Mr. Grindle on the 14th, it consisted only of the four pieces to which you refer?

A. That is absolutely right.

Q. There were no end plugs at all?

A. Absolutely not, Mr. Swain.

Q. And you left that with Mr. Grindle?

A. I left that sample with Mr. Grindle.

Q. Isn't it true you took that sample back subsequently and put end pieces in it?

A. No, it is not, Mr. Swain; not at all. [580]

Q. Did you put any calibrations on it?

A. I could have written—handwritten—handwriting—I recall of handwriting on the wood directly, pencil markings. But I pasted no paper calibrations nor did I receive any from Pan American to paste on there. This is a story made up for some reason by the plaintiff for his benefit. I still haven't depicted why.

Mr. Swain: I move that be stricken as non-responsive.

The Court: It may go out.

Q. (By Mr. Swain): Were you around when any destruction tests were being made?

A. Not that I recall, Mr. Swain.

(Testimony of C. Martin Welch.)

Q. Well, if you had been, don't you think you would recall?

A. I imagine I would have definitely recalled being at the destruction test.

Q. Were you shown a dipstick after it had been tested to destruction?

A. Yes; I seem to remember of having seen it, of it being shown to me by Mr. Grindle.

Q. Now, describe it to me; describe its condition after it had been tested.

A. It is difficult to remember, Mr. Swain, exactly how it looked. My attention was called in a letter of June the 10th to the fact that the ends split on it. I cannot definitely swear that I saw one. As I say, I seem to recall [581] that at a conference or a conversation between Mr. Grindle and I about the stick that was tested—that that ensued. I can't definitely state that I saw it, I don't remember the actual dipstick enough to describe it to you. It is logical to assume that he would have showed it to me, but I can't say.

Q. Well, you have just described it in considerable detail as being substantially identical to Exhibit H.

A. That is the stick I took over to them and it would be the only one they had to destroy or to test to destruction.

Q. And that you can't recall what is meant by the end splitting?

A. The letter of June 10th states that the ends split on it, and it seems to me to help me recall that

(Testimony of C. Martin Welch.)

Mr. Grindle talked with me about the splitting of the ends. But I can't honestly say.

Q. Do you recall seeing it, whether the end was split or not?

A. Not so vividly that I could describe it to you. I may have seen it and I may not have. I couldn't describe it to you from sight.

Q. Were these parts given back to you after this test? A. No; not as I recall.

Q. Do you know what happened to them?

A. No; I do not. [582]

Q. Now, Mr. Welch, before this was given to Pan American, you knew that a paper scale was going to be put in here, didn't you?

A. Let me put it this way: If we were to use wood, yes. If we were to use metal, no.

Q. Well, since you were using wood, you knew a paper scale was going to be pasted in?

A. If you use wood, you would have to have a paper scale on it, but not necessarily. I will rectify that. I will say unless you painted or imprinted it, imprinted the marks on the wood, you would then have to have a paper scale on it to show the calibrations.

Q. And if you were going to have a paper scale, the ends should be sealed, shouldn't they?

A. It is safe to assume that, Mr. Swain, yes.

Q. Well, is there any doubt about it?

A. Well, there would not have to be, but you wouldn't have a very good stick unless you did; let's put it that way.

(Testimony of C. Martin Welch.)

Q. Precisely. And what kind of a stick would you have to test if this were all you had?

A. You'd have all the stick you needed to test for destruction purposes.

Q. In other words, it is your testimony, then——

A. For the destruction purposes that he wanted, I guess. [583] It is quite clear in that June 10th letter that they tested this.

Q. It is quite clear that they tested it?

A. Tested the piece to destruction, and they stated it split on the ends. And they state nothing in the June 10th letter about the plugs having been put in the ends. They said, "We altered the design to accommodate some plugs—so plugs will be put in the ends," if I am not mistaken. Am I right?

Q. You are testifying; I am not. But did you know how this was going to be tested to destruction?

A. No.

Q. Had no idea of what was going to be done with it? A. No.

Q. Well, is it customary to test something to destruction when it isn't even complete?

A. I wouldn't think so, Mr. Swain. In some cases, but if they were testing the durability of the other parts of that tubing, I would say that they could have easily tested it.

Q. Well, you knew that one of the problems was that this thing fell off airplane wings while it was being used from time to time, didn't you?

A. I knew there was going to be—it was going

(Testimony of C. Martin Welch.)

to be used on wings and then being used, it was logical it would fall off, yes. [584]

Q. Well, one of the hazards if it fell off a wing was that the parts would become loose and tend to separate, wouldn't they? A. That's possible.

Q. And in order to keep this wood filler in, shouldn't you have some sort of seal at the ends?

A. You can make that so tight it would never come out, Mr. Swain.

Q. If you made it that tight, Mr. Grindle (sic), you wouldn't be able to assemble it with a paper sheet pasted in, would you?

A. Not if it was that tight, you would never get the paper in.

The Court: I think we will take the recess now, Mr. Swain. I have a matter at 9:30 in the morning. So 10:00 o'clock?

Mr. Naylor: Very good, your Honor.

(Whereupon, an adjournment was taken to tomorrow, Thursday, March 1, 1956, at 10:00 o'clock a.m.) [585]

Thursday, March 1, 1956—10:00 A.M.

The Clerk: Grindle versus Welch, on trial.

The Court: Proceed.

C. MARTIN WELCH

the defendant herein, resumed the stand and testified further as follows:

Mr. Swain: Your Honor will recall that yesterday afternoon I mentioned the matter of Mr. Welch's deposition. Yesterday evening I called the reporter and asked what happened; they gave me the deposition still in its original cover and indicated that they had written Mr. Welch a letter asking him to come in and look at it. I would like to at least put this in for identification at this time and then ask Mr. Welch concerning it.

Cross-Examination

(Continued)

By Mr. Swain:

Q. Mr. Welch, do you recall receiving a letter from the reporter who took the testimony asking you to come in and see the deposition and sign it and approve it?

A. A letter from the reporter?

Q. Yes. A. No; I don't.

Q. Have you seen the deposition in Mr. Naylor's office? A. My deposition? [586]

Q. Yes.

A. I received a copy from Mr. Naylor and returned it to him.

(Testimony of C. Martin Welch.)

Q. Did you read it? A. What?

Q. Did you read it? A. Yes.

Q. And did you make any corrections or notations on it, do you recall? A. No.

(Thereupon, the deposition referred to above was marked Plaintiff's Exhibit No. 34 for identification.)

Q. (By Mr. Swain): Yesterday afternoon, I believe——

Mr. Naylor: May I interrupt to say that there will be no technical objection with respect to this deposition, but just so that the record will be straight, I have not personally received any letter or copy of a letter from the reporter directed to Mr. Welch concerning the signature, but I certainly am not going to stand on any technicality with respect to the signature or filing.

The Court: Very well.

Mr. Swain: Thank you.

Q. We had gone into the matter of the dipstick which was sent you by Mr. Kerr of Los Angeles. Do you recall that bit of testimony yesterday? [587]

A. Yes.

Q. Now, just to summarize it, it is my recollection that you stated that the device which was sent you by Mr. Kerr consisted of four parts, which were an outside plastic tube, two inner tubes and a wooden filler.

Mr. Swain: Your Honor, I am just asking these questions just to expedite matters, to refresh the

(Testimony of C. Martin Welch.)

witness' recollection and make sure that I am saying the proper thing.

Q. (Continuing): —and that the inner wood filler was loose—loosely fitted, in other words.

A. That was to the best of my recollection, yes.

Q. Now, I will hand you Plaintiff's Exhibit 34 for identification and direct your attention to page 12, line 21. Have you found that, Mr. Welch?

A. Yes, sir.

Q. "Q. Would you describe the sample for us?

"A. Yes; I would. It was a piece of $\frac{3}{4}$ -inch square clear plastic tubing on which a wood spacer bar was inserted to separate two smaller quarter-inch round pieces of plastic tubing that were inserted in opposite corners.

"Q. Would you like to make a sketch?

"A. Yes."

Mr. Welch, did you make a sketch as a result of those questions? [588]

A. Yes; I did.

Q. And can you find that sketch at the back of the deposition?

A. I have located it.

Q. And that is marked Exhibit No. 4, is it not?

A. Yes.

Q. Does that spacer, which is identified with a wood spacer there, represent the wood spacer which was sent up by Mr. Kerr?

A. It represented what was the wood spacer I received from Mr. Kerr. That was the best of my recollection at that time.

Q. And that drawing does not show any square cuts on the corners to receive the tubes, does it?

(Testimony of C. Martin Welch.)

A. No; it does not.

Q. The spacer appears to be a rectangular piece of wood; is that right?

A. I would say oblong rather than a square rectangle.

Q. Oblong. And yet the side edges which are in proximity to the round tubes are flat and are not cut out?

A. That is right.

Q. Did Mr. Kerr's bid include a wooden filler?

A. I didn't hear you.

Q. Did Mr. Kerr's—excuse me, just a moment. Simultaneously with sending up the sample did Mr. Kerr forward a bid?

A. Yes. [589]

A. To be submitted to Pan American Airways?

Q. No; I asked you if he forwarded you a proposal or a bid to be submitted to Pan American Airways.

A. Yes.

Q. And did you submit that to Pan American Airways?

A. No.

Mr. Naylor: Mr. Swain, I would suggest that you go ahead with the identification of the photo print and I will locate the original and make the substitution if necessary.

Q. (By Mr. Swain): Mr. Welch, I hand you a photo print copy of a document—

Mr. Naylor: Here it is.

Mr. Swain: Strike that, Mr. Reporter.

Q. Mr. Welch, I will hand you an original copy of a document dated May 11, 1948, and ask if you can identify it?

A. Yes.

Q. And that is a proposal then from Plastic

(Testimony of C. Martin Welch.)

Process Co., Inc., to Pan American Airways System, is it not? A. Yes.

Q. I note that it states as follows:

“We quote you as follows on components ready for assembly of fuel gauge dipstick, no calibrations, per sample; material clear tenite II.”

What is the sample referred to there?

A. The sample that Mr. Kerr had sent along with the quotation. [590]

Q. The sample about which we have been talking this morning? A. That's right.

Q. I am handing you Defendant's Exhibit I and I direct your attention to the last paragraph, which reads as follows:

“While we do not like to get too involved, I would like to quote on all of the components as that would enable us to furnish an assembly ready for calibration with assurance that all of the parts will go together.”

You followed my reading, did you?

A. Yes.

Q. Now, can you explain how Plastic Process Co., Inc., whom I take it you represented, could make a quotation on all of the parts in accordance with the sample when the sample didn't have a suitable filler?

A. You would have to reframe your question so I could answer yes or no. I can't answer that without explanation.

Q. Well, did the proposal of Plastic Process Co., Inc., include a proposal on a wooden filler?

A. No.

(Testimony of C. Martin Welch.)

Q. I direct your attention to the deposition, page 11, and particularly line 21 thereof—have you found it? A. Yes; I have located it.

Q. (Reading): “Q. Did he supply you with a quotation in answer to this letter of May 3rd, 1948? [591]

“A. No; he did not. They supplied a quotation later on, not for dipsticks but for component parts: The wood, the tubing, pieces of tubing.”

Did you so testify? A. I did.

Q. Isn't that at variance with your testimony now?

A. I was in error on the wood after reviewing the “quote.” The quote isn't for wood.

Q. What on the quote indicates that the wood is not to be included?

A. That is correct.

Q. No; I say what is there on the quotation that indicates that the wood is not included?

A. Because the material states tenite—clear tenite II.

Q. But the only exception noted is “no calibrations”; isn't it?

A. I can't answer that question yes or no.

Q. Well, do you see any other exception which is noted? A. Yes. [592]

Q. What?

A. “Material,” dash “Clear Tenite II.” That is not wood.

Q. I appreciate that, but the quotation says, “No calibrations,” and it is in accordance with a

(Testimony of C. Martin Welch.)

sample which contained a wooden filler of some kind, isn't it? So then wouldn't the quotation include a wooden filler?

A. May I explain my answer?

Q. I wish you would answer it and then you may explain.

A. Would you repeat the question?

The Court: Read it, Mr. Reporter.

(Question read.)

A. No, because the plant we are seeking of that sent this quotation up is not a wood mill, has never processed wood parts, today does not do it, didn't in 1948; they make only plastic materials such as Clear Tenite II and many others. They are not set up, Mr. Swain, to make wood, and never have.

Q. They are not set up to make calibration either, are they? A. No.

Q. And yet they sent up a sample having four parts and indicated that they wanted to bid on the whole thing; the only thing that they excepted were the calibrations, and the sample that they said they would make it to contained a wooden filler, and yet it is your testimony that the [593] quotation did not intend to include the filler; am I right or am I wrong?

A. You certainly are right; it is my testimony that the quotation does not include the wood filler.

Q. Mr. Welch, if the quotation related to the plastic parts, which would then be the only square outer tube and the two inner tubes, why would it

(Testimony of C. Martin Welch.)

be necessary to make the comment in the last paragraph of Exhibit I, which is:

“While we do not like to get too involved, I would like to quote on all of the components as that would enable us to furnish an assembly ready for calibrations with an assurance that all of the parts will go together.”

Doesn't that indicate to you that there is supposed to be a wooden filler which they wished to supply, too?

A. It is possibly in Mr. Kerr's "calibrations" that he denoted the wood filler with the calibrations either stamped thereon or put on in some other way.

Q. Well, let us assume, following your line of reasoning, that he did not intend to supply a wooden filler, what would be the difficulty involved with fixing the other three components so they would fit together?

A. You ask me what would be the difficulty?

Q. Yes.

A. He could have been supplied the wood filler by me so [594] that they would fit, and was supplied the wood filler by me in his first run so they would fit together.

Q. I am talking about Mr. Kerr.

A. He was supplied the wood filler for the first run—a sample of the piece of wood that we wanted for the first run of tubing so that the parts would fit together.

Q. Is it my understanding, then, that Mr. Kerr

(Testimony of C. Martin Welch.)

Q. Actually supplied some dipsticks here aside from the sample we have been talking about?

A. No; he supplied the tubing.

Q. He supplied the tubing and you supplied the wood fillers?

A. I caused to be made the wood fillers, yes.

Q. But back on May 11th, it is your testimony, then, that he didn't care about the wooden fillers; is that right?

A. It is my testimony that on this quotation of May 11th there appears a definite statement that the material he is quoting on is Clear Tenite II, and we both agreed that that is right.

Q. And it is equally clear that his bidding on sample which had a wooden filler in it——

A. He states, "per sample."

Q. And that is also consistent with the testimony in your deposition which I read to you?

A. I could have been in error on the testimony in the [595] deposition.

Q. Did you testify on direct examination as to the length of the wooden filler in the tube which Mr. Kerr sent up?

A. As to the length of it?

Q. Yes. A. I don't recall.

Q. Well, do you recall the length of the filler?

A. I do not recall the length of the filler.

Q. In other words, you don't recall whether it went from one end of the square plastic tube flush to the other end?

A. I don't recall.

Q. It could have been shorter?

A. It could have been shorter.

(Testimony of C. Martin Welch.)

Q. And it could have been longer?

A. It could have been longer; I do not recall. I recall it being not exactly what I wanted, Mr. Swain, and that was the occasion to have some more made up by Mr. Klein.

Q. Did you know at the time you submitted the original letter to Plastic Process Company that the ends of a dipstick of this character would have to be sealed? A. I don't believe I did, no.

Q. When did you first conclude that they would have to be sealed?

A. To the best of my recollection, Mr. Swain, some time between the period of May 14th and, let us say, June the 1st, [596] or June 5th or June the 10th.

Q. Wasn't it apparent to you right from the start that these ends would have to be sealed?

A. Absolutely no.

Q. Well, I direct your attention, then, to page 17 of your deposition beginning on line 10:

“Q. As soon as you received the quotation, then what did you do?

“A. Well, immediately after receiving the dipstick and the letter of transmittal—I wasn't concerned about the quotation because in our previous prior discussions Plastic Process Company wasn't interested in doing any of the assembling; they were willing only to make the component parts. So it was decided between Plastic Process and myself that in order to furnish the finished product, I would have to do the assembling of the component

(Testimony of C. Martin Welch.)

parts, have to take care of sealing off the ends. Naturally, it can be readily assumed that it would have to be sealed off. I got in contact with Mr. Klein first and had him help me set up his saw and I milled out—he or I, I don't recall definitely whether he made—we made six parts, or whether he made two or three of them, I don't know. I made either all or part of the six parts that were made, **out of which** we finally selected one that we thought was best looking [597] to show our principle of having the milled out wood between the tubes.

“Q. When did you get together with Mr. Klein?

“A. This would have been the same day that I received the sample, which I assume to be around a day or a day after—it's right around the 12th of May.”

Then skipping over to page 19, line 14:

“Q. What did he suggest doing after that?”

I might interpolate here, your Honor, that the prior question related to Mr. Grindle.

“A. He suggested that I furnish him a quotation on the part. We discussed the final facts of the feasibility of adapting a paper chart to the wood as such, and of course we discussed also the natural requirement for having to fill the ends.”

Well, now, in your testimony you say “Naturally it can be readily assumed that the ends would have to be sealed off.” Again I ask you, didn't you realize that the ends would have to be sealed off at the time of the first visit?

A. No, it wasn't definitely what the assembly

(Testimony of C. Martin Welch.)

would be at the time of the first visit.

Q. You knew this thing was supposed to be dipped in a gasoline tank, didn't you?

A. That's right.

Q. And in the letter, Defendant's Exhibit E, which I [598] understand you wrote, you state this:

"You will note on the sample that there is a wood section upon which is pasted a graduate paper scale on each of its four sides."

Do you follow me? A. Yes.

Q. And that paper scale and the wooden filler were to go inside an elongated, enlarged cavity in the center of Defendant's Exhibit F which I am handing you; is that right?

A. Yes, it was explained to me at the time. [599]

Q. Is there any indication on there that the ends were to be sealed? Is there any indication on Exhibit F that the ends were to be sealed?

A. None.

Q. If the ends were not to be sealed, or if there was no indication on there that the ends were to be sealed, wouldn't it be assumed that the gasoline would run up on the inside of that larger cavity as well as running into the smaller cavities?

A. May I ask you to advise me of what date you are speaking?

Q. I am speaking of the time when that drawing was transmitted by you to Plastic Process together with the letter, Exhibit E, which you also have in your hand.

A. Would you repeat the question, then?

(Testimony of C. Martin Welch.)

Q. Well, I don't know whether I can repeat it, but I will rephrase it. A. Rephrase it.

Q. At the time the letter, Exhibit E, and the drawing, Exhibit F, were forwarded to Plastic Products, wasn't it apparent that the gasoline would go up into the interior or center cavity just the same as it would go into the little cavities on the side?

A. That was not my concern at the time. I was concerned only with furnishing an extrusion at the time and the [600] problems involved I was not concerned with.

Q. But you knew there was a paper scale going to go in there, didn't you?

A. To the best of my recollection, I was told that there would be a wood filler and a paper scale to go in there, yes.

Q. And at that time you didn't appreciate that you would have to put some sort of a sealer in the bottom to prevent deterioration of the scale.

A. I wouldn't have to put any sealer in the bottom because I was only asked to quote on the extrusion.

Mr. Swain: Now referring to the original bid, which I think I have handed the witness but I don't think I have yet identified, I ask that the bid or proposal bid of May 11th from Plastic Process Co., Inc., to Pan American Airways be marked, both identified and received, as plaintiff's next exhibit.

The Court: So ordered.

The Clerk: Plaintiff's Exhibit 35.

(Testimony of C. Martin Welch.)

(Whereupon, the bid of May 11th referred to above was received in evidence and marked Plaintiff's Exhibit No. 35.)

Mr. Naylor: No objection. May it be noted that that was previously Plaintiff's Exhibit 3 on a deposition in this case.

Q. (By Mr. Swain): Was that proposal, Exhibit 35, ever [601] submitted to Pan American Airways? A. No.

Q. Why not?

A. 'This is the original copy.

Q. Why wasn't it? A. Why wasn't it?

Q. Yes.

A. I can only answer you to the best of my recollection, Mr. Swain, that during an interim period from May 3rd, the date of first contact with Mr. Grindle, and through the period of having submitted him the first sample, it was either suggested by Mr. Grindle or requested by Mr. Grindle that I consider the making of the complete part. I assume that time to be even between the period of having him submit—receive the first sample I submitted, on or about May 14th. It may have been that day. Does that answer your question, "Why not?"

Q. Not entirely. May I clear it up?

A. If you will, please.

Q. Did you have any facilities for making anything at that time—or manufacturing anything? And I am talking now about May the 10th, let's say, to May the 20th. A. Yes.

Q. What facilities?

(Testimony of C. Martin Welch.)

A. A product like this you would require only room. I had the accessibility, including plenty of room in my basement, to [602] a very complete workshop containing a 9-inch South Bend lathe, table saw, drill press and so forth.

Q. So you had facilities then at Mr. Klein's, as I understand it?

A. Yes; they were available to me at that period.

Q. And at that time did you know what the end product that was going to be ordered by Pan American was?

A. I would like to have you establish a little more definitely of what date you are speaking when you say "at that time"; whether or not you mean during the period from the 14th to June 7th or 10th, before answering the question.

Q. Well, let's take the time of May 11th and the next week after that; that is the time that we have this order that was not given to Pan American. At the time of May 11th to say May 20th, did you know precisely what Pan American wanted?

A. I could have had a close idea but I could not have been aware of the calibrations required.

Q. At that time then did you know that the ends had to be sealed?

A. It could have been, Mr. Swain, that I learned some time between the period of May 11th and June 1st that the ends had to be sealed. I wouldn't strike it on that to a necessary date like May 20th.

Q. So then it is your position that it was Mr. Grindle's suggestion that you make these? [603]

(Testimony of C. Martin Welch.)

A. No, it isn't my position that it was Mr. Grindle's suggestion.

Q. I am sorry; I thought that is what you said. What did you say then? Who did suggest that you make these dipsticks?

A. I said I didn't recall. To make the dipsticks?

Q. Yes.

A. I don't recall. I believe it was Mr. Grindle's either suggestion or request that I do the manufacture of the dipsticks.

Q. I direct your attention then to page 17 of your deposition, particularly lines 16 to 18 which I have already read:

"So it was decided between Plastic Process and myself that in order to furnish a finished product I would have to do the assembling of the component parts, have to take care of sealing off the ends."

Does that refresh your recollection?

A. In what manner?

Q. That it was Plastic Process and you who decided this.

A. That could have been after it was requested by Mr. Grindle that Plastic Process or myself engage in the manufacture of the dipstick.

Q. Then immediately after receiving the dipstick and the letter of transmittal, or immediately prior to that, you and Plastic Process had not discussed this; is that right?

A. Has not discussed the manufacture of [604] them?

Testimony of C. Martin Welch.)

Q. Yes.

A. May I say, Mr. Swain, that Plastic Process Company and I discussed the manufacture of them some time during the period of from May 3rd and May 30th, and it was decided by Plastic Process Company that they were not interested in the manufacture of the dipstick.

Q. Could you say that you and Plastic Process had come to that conclusion before May the 14th?

A. I will stand on what I just said, some time between May 3rd and May 30th. Those dates are too hard for me to recall.

Q. Mr. Welch, on your direct examination it is my recollection that you testified that the calibration charts were supplied you by a printing house here in town?

A. For the initial order, yes.

Q. That was the initial order to be supplied to Pan American? A. That is correct, sir.

Q. And that is the initial order of a hundred, and I believe you have said that 54 or some such number were first delivered, and then the others were subsequently delivered some time in the latter part of August, I believe? A. Yes.

Q. You so testified?

A. I so testified.

Q. Did Mr. Grindle ever supply you with the charts for that [605] order? A. Yes.

Q. Then which charts did you use, the ones that you received from the Independent Press Room or the ones from Mr. Grindle?

(Testimony of C. Martin Welch.)

A. He hadn't supplied me with charts, Mr Swain, prior to the first order.

Q. He had or had not? A. Had not.

Q. And the dipsticks which were supplied to Pan American on the first order used printed charts received from the Independent Press Room?

A. The first hundred dipsticks, yes, were with charts printed by Independent Press Room and even pasted on the wood by Independent Press Room.

Q. I direct your attention to your deposition page 31, beginning at line 15:

"Q. Why were you willing to give them this differential in price?

"A. Well, that letter would explain it if you could produce it, sir. I believe I stated therein that out of respect to their having—whether or not it states exactly in so many words, I don't know, but Pan American furnished me the charts initially to make up the dipsticks and that [606] saved a considerable printing cost."

Did you so testify? A. Yes, I have.

Q. Then I direct your attention to page 58, line 5. Do you have that? A. Line 5, yes.

Q. (Reading): "Q. You have referred under direct examination—

"A. I have one other addition to make, Mr Naylor, I was charged approximately \$150 for a printing plate that proved unserviceable in that it was made of such large size that it broke during the

(Testimony of C. Martin Welch.)

first run of paper charts that were made on it.

“Q. Which paper charts are you speaking of now?

“A. The initial paper charts we used on the first 100 dipsticks. They were not supplied by Pan American. They were supplied by Mr. Grindle after this problem of my having to invest in big die plates for running them on a roll press. He assured me that they would furnish me with the charts that were made in another printing matter.”

Did you so testify?

A. This testimony corrected my previous testimony, yes.

Q. That Mr. Grindle supplied you with the charts for the first 100? [607] A. No.

Q. Did the printing plate break or didn't it break?

A. It did not break, it warped after it came out of the press. After the first run was made it warped so that it could be used no longer for another run.

Q. On page 31 you say, “Pan American furnished me the charts initially to make up the dipsticks and that saved a considerable printing cost.” Is that a correct statement?

A. I correct it later. It is not a correct one; I correct it later in the same deposition.

Q. And by later do you mean the last quotation I read to you? That is on page 56.

A. I would have to go through this whole deposition, but I will answer your question in this man-

(Testimony of C. Martin Welch.)

ner: If this is the last reference to printed charts, it is the one that corrects two previous references to printed charts having been furnished me by Pan American. In two previous parts of the deposition—still answering your question—I stated that Pan American furnished the initial charts. I correct it on a third portion of the deposition. Hence, my attorney advised me not to bother about establishing with the reporter any correction upon it. I corrected it automatically in the deposition.

Q. But you did testify as I read; there is no doubt about that testimony which I read on those two pages, is there? [608]

A. I testified according to this whole deposition, yes.

Q. Mr. Welch, I hand you Exhibit R-1. Have you seen that drawing before? A. Yes.

Q. In the upper right hand corner of that drawing you refer to a valve control model?

A. Yes.

Q. Do you recall when you first gave consideration to a valve control model as indicated in that drawing? A. I couldn't recall the date.

Q. Was it anywhere around May 12th, 1948?

A. I have no idea, Mr. Swain, just when it was. Somewhere between May 12th, 1948, and possibly the present date you can say. It was some time after May 12th, 1948, I will state in answer to your question.

Q. Well, can you tell me whether it was on the drawing of May 12th, 1948?

(Testimony of C. Martin Welch.)

A. I don't believe this drawing was made on May 12th, 1948; I am not sure. It could have been, but I don't recall it as having been.

Q. When did you first give consideration to such a valve control model? By that I mean what were the circumstances surrounding your first consideration of such a device?

A. I don't recall, Mr. Swain. The only recollections I have that I can directly testify to is where they are [609] documented and I have refreshed my memory with dates. This I cannot help you on because I don't recall the exact date. It is too difficult for me to remember eight years ago.

Q. Do you recall whether the problem was presented to you by a potential customer or whether it was a happy thought that you happened to get while driving up and down the Bayshore, or was it suggested by Mr. Grindle, or how did it arise?

A. It could have been suggested by Mr. Grindle; it could have been suggested by someone else; I don't recall.

Q. Will you explain to me again why you signed this drawing as of the date May 12th, 1948?

A. I didn't sign it as of the date May 12th, 1948, Mr. Swain.

Q. By that do you mean that you didn't sign it on the date of May 12th?

A. That is my signature and that is my writing, "12 May, '48"; but the "12 May, '48" refers to when the first sample was assembled, not to a date I signed it, nor does it refer to a date the drawing

(Testimony of C. Martin Welch.)

was made; it refers to a date the first unit was made.

Q. And was the first unit supposed to be identical to that shown in the drawing?

A. Oh, heavens, no.

Q. Well, do you recall then when you signed it? [610] A. No.

Q. Do you recall when you did date it actually?

A. Pardon?

Q. Do you recall when you did date it or when you did apply that date?

A. That date was applied on the day I signed the signature I can only assume. I assume it to have been put on there the date I applied my signature.

Q. And what purpose was going to be made of this drawing after it was signed and the date May 12, 1948, was put on it?

A. As near as I can recall, I was urged by Mr. Klein to—I believe he indicated it was a Scotch patent—to mail this drawing to myself when upon his continued insistence I had refused to go to a patent attorney, to get some kind of a Scotch patent, I believe he called it.

Q. Did you insert this drawing in an envelope and mail it to yourself?

A. No, I didn't. That seemed not too feasible for me at the time.

Q. Then for the purpose of obtaining a Scotch patent was it your intention to indicate that the invention of the drawing was conceived on or about May 12, 1948?

(Testimony of C. Martin Welch.)

A. I wouldn't say that that was the only purpose.

Q. Then what——

A. The date of 12 May, 1948, represents, apparently here [611] represents the construction of the first part, the very first attempt at the dipstick; that is, two tubes within a tube with a square piece of wood.

Q. But without any plugs?

A. Absolutely not; without any plugs.

Q. I direct your attention in your deposition to page 51 and particularly to, oh, line 11, let's say. Have you found it? A. Yes, I have.

Q. (Reading): "Q. (By Mr. Hohbach): Who was the draftsman for this drawing?

"A. Lou Klein, my next-door neighbor. I have already furnished you with his address.

"Q. When was the drawing made up?

"A. When we were making up the dipstick. At the time we made up the first sample.

"Q. I see it is dated May 12, 1948. Was the drawing made up on that date?

"A. Well, I certainly would assume that it is the day I signed the drawing.

"Q. That would mean that the drawing was made up prior to that, is that correct?

"A. It would have to be made up prior to the day I signed it, prior to the moment I signed it."

Do you recall so testifying? [612]

A. You are speaking of generalities during a period of time here, yes.

(Testimony of C. Martin Welch.)

Q. And then it is a generality when you say, "Well, I certainly would assume that is the day I signed the drawing"?

A. I found in four instances that the recorder here, one word would be changed. If I would have said—may I continue?

Q. Yes.

A. If I would have said, "Well, I certainly would assume that it is the day I signed the drawing," it could also have been dictated, with the change of one or two words, "It is the date I put on the drawing when I signed it."

Q. Well, are you claiming then it is a reporter's error?

A. No, I am not claiming that. I am claiming that either—my testimony at the time referred to the date of May 12th on it and I testify, well, I certainly would assume it is the day I signed the drawing.

Reading further back: "Was the drawing made up on that date?"

Excuse me; I have reference to different pages in this—apparently have reference to different pages in this deposition that I recall reading. I don't recall them now.

Q. Well, do you recall, Mr. Welch, whether when you read the deposition over you made any suggested corrections to the parts which I have just read you? [613]

A. I was advised not to make any changes in

(Testimony of C. Martin Welch.)

the deposition unless I considered them absolutely necessary.

Q. Now then, it was my recollection that you testified that the notation "print five" in the lower lefthand corner of that drawing has no particular significance; is that right?

A. I believe I testified I didn't know what it was put on there for. It is like a gravel truck company with two trucks numbering them 10 and 16 to show that they have 16 instead of 2; I don't know, that's just a thought.

Q. Were there any other prints made up at the same time?

A. Skethes only, I recall, but no print as such, no. This "print No. five," I don't know what it was put on there for.

Q. There were no series of prints preceding this? A. Actual prints, no.

Q. Were there any prints after this which bore any number in relation to this print?

A. Quite a considerable number of them, yes.

Q. Made by whom?

A. Some by myself and some by a draftsman I hired.

Q. Do they relate to dipsticks?

A. They do, yes, exclusively.

Q. Do you have them available?

A. Not in the courtroom. We made possibly a hundred of them. [614]

Q. Do they bear any legend or print number on them?

(Testimony of C. Martin Welch.)

A. They all have a print number on them.

Q. Have you checked through them recently to see whether there is a print 1, 2, 3 or 4?

A. Oh, no, they have a far different series of numbers than five. They are numbered, all of them but in a far different series. They start, I believe at a thousand and they go on up to quite a high number, 9700.

Q. Are those prints to which the dipsticks are now manufactured for various companies?

A. That is correct.

Q. Now, Mr. Welch, after you had received the order from Pan American Airways, what did you do next?

A. I believe one of the first things I did was order plastic tubing and wood. They would be the two natural first steps, and three—I should also include three natural first steps, with the width tubing and paper charts.

Q. I hand you Plaintiff's Exhibits 10, 11 and 12. The original order was directed to Plastic Process Company, was it not? May I direct your attention to Exhibit 11?

A. Exhibit 11?

Q. Exhibit 11 is the Pan American World Airways order No. 30015.

A. I have it. Will you take these back?

Q. The question, Mr. Welch, was whether or not that was [615] directed to Plastic Process Company?

A. It was directed to be done so at my request, yes.

Q. At that time did Pan American World Airways System realize that they were supposed to b

(Testimony of C. Martin Welch.)

dealing with you and not Plastic Process Company?
Did they know that you were going to supply the
dipsticks and not the Plastic Process Company?

A. When you say "they" I can only say that
Mr. Grindle knew.

Q. Mr. Grindle knew and yet the order was
made out to Plastic Process Company.

A. That was the name I was operating on, or one
of the names that appeared on my door at the time
—painted on the door.

Q. Were you an employee of theirs?

A. Not a paid employee.

Q. You weren't working for them?

A. Well, you asked me if I was an employee, and
I say not a paid employee. I meant to say I was not
on a regular salary with them, no; I was not a
salaried employee.

Q. Weren't you simply a manufacturer's agent
up here in San Francisco?

A. You could call it that, yes; I was supposedly
sales manager of their Northern California Division
—am today.

Q. Did they pay social security on your salary?

A. No, they take no—— [616]

Q. Did they take any withholding tax on your
pay? A. No.

Q. Did they pay your rent?

A. I believe at one time they offered me some
monies toward office expenses, but it wasn't a con-
tinued practice, no.

Q. That was your business at 55 New Mont-
gomery Street, was it? A. That is correct.

(Testimony of C. Martin Welch.)

Q. You came and went as you pleased?

A. I do, yes.

The Court: We will take the recess.

(Recess.)

Q. (By Mr. Swain): Mr. Welch, I believe we were discussing Exhibits 10 and 11 which you have in your hand, were we not? A. Yes.

Q. Directing your attention to Exhibit 10, that is the quotation on the letterhead of Plastic Process Co., Inc., is it not? A. Yes.

Q. Directed to Pan American Airways Engineering Department? A. Yes.

Q. And it is signed at the bottom? A. Yes.

Q. "Plastics Process Co., Inc., by C. Martin Welch, Manager, San Francisco Office"? [617]

A. That is the style I followed at the time, yes.

Q. I direct your attention to the following: "300 dipsticks complete per sample submitted but with printed scale." A. Yes.

Q. What is the sample referred to there?

A. One piece of square tubing, two pieces of round tubing and a section of wood filler.

Q. In accordance with what sample?

A. The one submitted to Mr. Grindle on the 14th of May.

Q. This then was a proposal to submit a dipstick without any end seal at all?

A. That is correct; the end seals did not come in until Mr. Grindle's request later.

Q. I hand you Defendant's Exhibit P.

(Testimony of C. Martin Welch.)

A. Yes, sir.

Q. Do you know when you first received that?

A. Approximately the 11th of June.

Q. That drawing is dated the 7th of June, is it not?

A. That was the date on the drawing, yes.

Q. And it is your testimony that at the time you submitted this order you did not contemplate a stick having ends sealed?

A. That is directly shown in this letter of June the 10th that I did not contemplate it. The letter of June 10th informs that they want them and adds 25 cents apiece to them. [618]

Q. The order from Pan American Airways is dated June 21st? A. That is correct.

Q. And that refers to a drawing 32.061.114?

A. Right.

Q. Is that the drawing which you have in your hand, Exhibit P? A. That is correct.

Q. What does that call for?

A. It calls for calibrations, a graduation chart to be put on the dipstick, with a wood filler, detail 6; and assembly according to the detail on the assembly, and in substance that is it.

Q. It called for some method of sealing the ends, didn't it?

A. Yes, it is in the assembly I just gave you, with details.

Q. And it is your testimony then that the order, Exhibit 11, relates to a dipstick having plugs in the ends? A. That is correct, sir.

Q. Now you stated to me, I believe, a few

(Testimony of C. Martin Welch.)

moments ago that you knew some time between May 3rd and May 30th that the ends had to be sealed; is that correct?

A. I stated to you that some time between May 3rd and June 10th——

Q. I thought you said May 30th.

A. Were we speaking of knowing exactly what type of plugs [619] or discussing plugs?

Q. Discussing plugs and knowing that they would be used.

A. It is entirely possible. We discussed plugs prior to June 10th, yes, but there were none on the original assembly that was submitted. A plug sample was never tested prior to June 10th.

Q. Yet on June 7th you were bidding on a complete dipstick? A. Without plugs.

Q. Without plugs?

A. Yes, sir. I was allowed 25 cents more for putting the plugs in.

Q. Didn't the original drawing call for a block in the end? A. That is correct.

Q. When you filled the order why didn't you put a block in the end?

A. May I call your attention to the top part of the assembly in that drawing?

Q. Yes.

A. It says, "Seal both ends with AN-C-1411 cement, then smooth the cement flush."

Q. May I call your attention to the legend which says, "Block end, two required; cut out similar to 6." Do you see what I am referring to now?

A. Yes.

(Testimony of C. Martin Welch.)

Q. What does that mean to you? [620]

A. That was—I believe I have testified previously accordingly; it was at the time something that was unfeasible to me, the determination of the two called for sealing the ends, and I learned around that time you couldn't do it that way, it was impossible, because AN-C-141, in the first place is not a cement, and, in the second place, it is a specification for a cement to be used with acrylate.

Q. Did you ever take this matter up with Pan American Airways before you submitted the first 54 dipsticks?

A. I believe Mr. Grindle and I may have had discussions about this end sealing, because that was my only excuse for being late with the order, the only reason I couldn't deliver it on the 21st of July—shall I say very definitely the main reason?

Q. But the drawing does call for an end plug, does it not? A. Yes.

Q. And it shows end plug No. 12, does it not?

A. Yes.

Q. And then it calls for apparently a seal of cement AN-C which is to be smoothed flush with the ends of the outer tube, does it not?

A. Which couldn't be done at the time.

Q. Did you try it?

A. May I repeat again in answering your question that I determined first what was referred to with the lettering [621] AN-C-141 cement and immediately knew that it couldn't be done.

Q. Did you ever try it?

A. Mr. Swain, you cannot be ridiculous enough

(Testimony of C. Martin Welch.)

to take an acrylate base monomer having known what I knew then in the plastic business, and try to use it as a cement for cellulose acetate butyrate.

Q. Would you mind answering my question? Did you ever try it?

A. I answered it in saying it would be ridiculous for me to have tried it if we know that the two materials are diametrically opposed, or can obtain that information if we are not that intelligent.

Q. Then I assume that the answer to my question is "No"; is that right?

A. I knew it couldn't be done. To this day it cannot be done.

Q. But you never tried it to see if it could be done by chance, did you?

A. You don't try things that are ridiculous, that are diametrically opposed to each other, Mr. Swain. Two materials that are diametrically opposed you don't try to bond. You look for a bonding agent that is compatible with, not opposed to; you don't try the ones that you know are opposed to.

Q. All right. When did you first find out that they were, as you say, incompatible?

A. Some time between the period of June 10th and, shall we [622] say—this time I will advance a month so that I am sure—but shall we say some time between August 10th and August 28th or August 12th; it could have been immediately thereafter, but to be on the safe side, I would say between June 10th and August 12th I learned what AN-C was.

Q. Are you saying that, Mr. Welch, because you

(Testimony of C. Martin Welch.)

don't want to make a mistake in the future or because you remember that specific period?

A. I would like, may I, to establish that I cannot remember a date eight years back unless it has been documented or it was the birth of my child or it was a major date.

Q. You have given this case a tremendous amount of thought, haven't you?

A. I certainly have.

Q. And even with all that thought and consideration——

A. I still am not able to remember dates way back in 1948 unless I have an assist with a memo or a document.

Q. I hand you Defendant's Exhibit T and I direct your attention to the paragraph under the heading "Re: Pan American Dipstick." It says there, "Re: AN-C-141 cement and ethylene dichloride. No one can tell the difference." Did you try ethylene dichloride?

A. No, because I determined later through another source that AN-C-141 cement was not a cement. I never did receive the Army and Navy specification C-141. [623]

Q. Did you ask for them from Mr. Grindle?

A. No. Ethylene dichloride again is a solvent for but is not recommended as an adhesive for cellulose acetate butyrate—was not then and is not now. It is for methyl methacrylate.

Q. Did you try using ethylene dichloride in any

(Testimony of C. Martin Welch.)

way in connection with inserting a block in the end to seal it? A. No.

Q. What did you do then?

A. I purchased—eventually ended up purchasing eventually a series of solvents from Braun-Knecht-Heimann, and I selected eventually a solvent I found in a drugstore in Millbrae.

Q. What was the solvent to be used for?

A. I do not care to divulge that information. What was the solvent, did you say?

Q. What was the solvent to be used for?

A. With other materials and other chemicals to produce a cement—an adhesive.

Q. Simply to produce a cement or goop to fill up the ends? A. A goop filler.

Q. In other words, it was not to be used as a cement to hold a plug or block in place; is that right?

A. That is correct, that initially at the start it was not intended to hold a plug in place.

Q. Did you get anybody's permission to submit or to alter the specifications of the required [624] dipstick? A. No.

Q. You went ahead happily and made 54 dipsticks that were not in accordance with the drawing and took them out there?

A. They were real happy to get them, too, to the extent that they altered the drawing on September 1st to read like the samples or like the parts so that their inspection would receive them.

Q. Between the time of June 10th and the time

(Testimony of C. Martin Welch.)

the first 54 were delivered, did you go and see Mr. Grindle at Pan American Airways at any time?

A. It is entirely possible I did, yes.

Q. You don't know? A. I don't recall.

Q. Do you recall whether you acquainted him with the fact that the specifications on the drawing specified incompatible materials?

A. In answering your question, may we establish here that the drawing was supplied me on June 10th so I could get calibrations for making the dipsticks. I was not concerned with any other part of this drawing on June 10th or any date thereafter; it was my problem as of June the 10th to figure out the rest of it.

Q. It was my understanding from your testimony a few moments ago that the order of Pan American Airways was based upon this [625] drawing.

A. That is correct. The drawing was based upon a sample also that I submitted.

Q. And it calls for plugs?

A. Yes, that's right.

Q. Then wasn't it part of your problem to figure out a way to submit completed dipsticks with plugs in the end? A. It was quite a problem.

Q. Then you certainly must have been concerned with more than the calibrations.

A. I say it was my problem, I said; everything else is my problem but calibrations. Did you not understand me correctly?

(Testimony of C. Martin Welch.)

Q. Apparently I didn't.

A. The dipstick that I was to manufacture, the problems of making it were mine. I was concerned on this drawing only with the calibrations and knew verbally, possibly; but if not verbally, I knew by the letter of June 10th that they had to have blocks in them; but it was up to me, not up to Pan American, to determine a way to put the blocks in them.

Q. I gather from that that when Pan American Airways ordered something to conform to a drawing or in reference to a drawing, that you could supply it in any way you saw fit?

A. They changed that drawing, even the length specification on that drawing, to accommodate the way I made the dipsticks.

Q. I appreciate that, but you determined then it was your [626] problem then and not Pan American Airways' problem how those ends were to be placed?

A. That's for sure; they weren't making them, I was.

Q. But you were making them to their specifications.

A. Well, don't I find you aware, even today, that the drawing that was supplied me on June 10th and based on a sample that I submitted?

Q. But you ultimately went to a block in the end, did you not?

A. I went to a series of laminated parts.

Q. And didn't the series of laminated parts compose a block?

A. No, they weren't made into a block.

(Testimony of C. Martin Welch.)

Q. How were they made?

A. They were pressed individually into the assembly.

Q. Individually into the assembly?

A. Yes. They were not assembled—may I clarify it for you—into a block and then placed in the assembly.

Q. Are you familiar with your patent?

A. Yes.

Q. Mr. Welch, I hand you Plaintiff's Exhibit 2 and I direct your attention to the second column on the first page beginning about line 16.

Mr. Swain: Your Honor, I have an extra copy here that I believe is unmarked, which I can hand you for your use. [627]

The Court: I thought I had one here. I probably have.

Mr. Swain: This will facilitate it anyway.

Q. It says:

“After the measuring tubes and reinforcing bar are assembled within the tubular body 1, the ends of the body extending beyond the length of the bar 2 are filled and hermetically sealed by laminated plugs as shown in Fig. 3. These plugs are composed of the superimposed laminations 21, 22, 23 die cut from sheet plastic to the outline of the end of the bar 2, with a central hole for the round headed nails. The heavy plastic cement layers 25, 26 are interposed between the laminations in sufficient quantity to exude the marginal edges of the laminations. The laminated plugs are then inserted into the opposite

(Testimony of C. Martin Welch.)

ends of the body 1, and the nails 24, 24' are driven into the opposite ends of the reinforcing bar 2. This compresses the laminated plugs so that the cement layers 25, 26 are forced outwardly against the inner surfaces of the body ends and around the tubes 9, 10 and into the intervening interstices."

Is that section of your patent in error?

A. In what manner?

Q. Doesn't it indicate that you take the laminations, glue [628] them together and make a block out of them and then insert it in the end of a square tube?

A. Not as I can see, no.

Q. How do you get any other interpretation from these words: "The laminated plugs are then inserted into the opposite ends of the body 1"?

A. Well, Mr. Swain, whatever you are getting at I don't know, but we don't make those dipsticks today, nor did we then, with a nail in them.

Q. Well, forget about the nail. Let's just assume that you don't make them with a nail; doesn't the patent say that you make a plug out of some laminations and then put the completed plug in the ends of a square tube?

A. It says that we shoot a nail through them and I deny that we ever have.

Q. All right, then——

A. It says also, shall we say, that we put a nail through them. I deny that we ever have.

Q. Mr. Welch, let's forget about the nail for a minute and let's just stick to the laminated plugs. Doesn't it say that you make a plug out of some

(Testimony of C. Martin Welch.)

laminations and then insert the complete plug in—and so that you won't have to hunt any further, I direct your attention to line 28 of the second column on the right-hand side of the first page:

“The laminated plugs are then inserted into [629] the opposite ends of the body 1.”?

A. That doesn't say that they are inserted.

Q. It does not.

A. After you have made them into a block, no. It just says they are inserted. You put them in, in other words, would be my interpretation of that.

Q. Let's go back then. This is beginning on line 24. It says:

“The heavy plastic cement layers 25, 26 are interposed between the laminations in sufficient quantity to exude beyond the marginal edges of the laminations. The laminated plugs are then inserted into the opposite ends of the body 1.”

I am asking if that does not mean that a laminated plug is first assembled and then inserted into the end of tube 1?

A. You would have to finish your sentence before I answer, this sentence here, because it says, continuing:

“And the nails are driven in.”

Q. Does that make a great difference?

A. Yes, it does make a great difference in my estimation.

Q. I take it then that this patent doesn't describe how to make a device without nails?

A. It sure does.

(Testimony of C. Martin Welch.)

Q. Where? A. Over here in claim 2. [630]

Q. I am referring to the specification. Does it show you how to make a dipstick without a nail in the end?

A. This one shows how to make one with nails in the end, this particular portion.

Q. I see. Is there any other place in the specification now where it tells you how to make one without nails?

A. I would have to look it over carefully to determine that.

Q. But you don't know that it does or does not; is that right?

A. I would have to look it over carefully to determine whether it did or not.

Q. All right; suppose you look it over then during the noon hour and I will come back to that.

Now is the matter of column drop considered in the manufacture of dipsticks? A. Yes, it is.

Q. When did you first learn about this matter of column drop?

A. Possibly I knew about it initially in physics classes where you transfer fluid from one beaker to another.

Q. And when did you first become aware of the fact that it is necessary to consider the matter of column drop in the manufacture and sealing of dipsticks?

A. It wasn't considered by Pan American necessary on the initial order for 100 dipsticks, nor on

(Testimony of C. Martin Welch.)

any subsequent orders [631] for a year or two after, for that particular type dipstick.

Q. I believe you don't understand my question. I asked you when you first became aware of the fact that it was necessary, and I made no mention of Pan American Airways. I am asking you when you first became aware of the fact that it was necessary in connection with the manufacture and sealing of dipsticks.

A. May I offer to you a particular dipstick?

Q. Well, just tell me when you first became aware of it.

A. Well, I don't recall, Mr. Swain.

Q. All right. Would you like to refer to a particular dipstick among these down here?

A. I would like to refer to the 377 dipstick, Boeing Stratocruiser 377 dipstick which was the first dipstick—I don't know whether there is one here or not—which was the first dipstick we calibrated with a column drop compensation factor.

Q. Did you calculate the column drop yourself?

A. No, I did not.

Q. Who did it for you?

A. Mr. Grindle I believe either did it or caused it to be done.

Q. I would like to jump back away and take you back to the time when you first visited Shafer's Mill and ask you what you had with you at the time to show Shafer's Mill what you [632] wanted.

A. To the best of my recollection I had several pieces of tubing.

(Testimony of C. Martin Welch.)

Q. Several pieces of tubing? A. Yes.

Q. Did you have any wooden filler?

A. I would like to establish not on the first occasion of my visit—not possibly on the first occasion of my visit with Shafer's Mill, but prior to running the parts for me they found it necessary to have tubing. That is what I meant to say.

Q. Did they find it necessary to have some sort of a wooden filler before they could run the necessary order?

A. No, just the tubing. In order to run it out of wood they would require only the tubing and that would be for sizing purposes, Mr. Swain.

Q. What kind of a pattern did they have?

A. They had no pattern on the occasion of my first going to them.

Q. Did they ever have a pattern?

A. Oh, on later occasions they used the tubing I left with them and a sample of the previous run, and then they set up their molding sticker to that sample and would fit it into the tubes.

Q. Did they have a pattern on July 26, [633] 1948?

A. Yes, they would have had a pattern on July 26th.

Q. What was that pattern?

A. That was the pattern—when you speak of a pattern now, I assume you are referring to a piece of wood, are you?

Q. Yes.

(Testimony of C. Martin Welch.)

A. They had a piece of wood because they billed me for 500 of them I can see on July 26th.

Q. But the reference then to 500 linear foot, one by one, to pattern—do I gather from that that you did not bring them a pattern?

A. Oh, they had no pattern. That is the terminology in a wood mill, “to pattern.” “To pattern” means that they run it to a design; it is not a stock straight piece of wood. It is an expression used in wood mills since I have been associated with them.

Q. Where did they get the design? Did you draw some design for them?

A. I may have. I don’t recall; I may have sketched it out. I told them—showed them exactly what I wanted, and likely I sketched out on a piece of paper, but I don’t recall. It’s logical for me to have.

Q. But you did not take a pattern to them and tell them to duplicate it—a wooden pattern?

A. No. Oh, heavens no. I would have no way of obtaining one unless I got it from another mill with a molding sticker. 634]

Q. Getting back now to the patent, I believe you testified that you never made a stick with nails in the ends? A. That’s correct; I never have.

Q. Your patent refers to the matter of sedimentary deposit; I believe you have it next in there. Have you ever been bothered with any sedimentary deposit in connection with the use of these dipsticks?

A. No, not that I recall.

(Testimony of C. Martin Welch.)

Q. What do you believe are the chances of their being a sedimentary deposit in a gas tank, in an airplane fuel tank, at the point where these sticks are used?

A. I would assume that the only time there could be would be immediately after it got in there or started to form, because the fuel pumps would clear it, I would assume.

Q. Are these dipsticks to be used anywhere but in connection with measuring fuel in wing tanks?

A. I make sticks to measure the fuel in other tank locations.

Q. And are all of these tanks equipped with sloping bottoms?

A. I make quite a range of dipsticks for different tanks at the present day. I would like to have you clarify your question.

Q. Well, I think the question is clear. I asked whether or not all of the airplane gas tanks for which you provide [635] dipsticks are gasoline tanks with sloping bottoms.

A. No.

Q. They are not?

A. No.

Q. Were they back in 1949, August of '49, when this application was filed?

A. I would have to refer to my office files to find out if the particular stick I have in mind—that allows me not to answer “yes” to your question—I would have to refer to our files to see if we manufactured it prior to August. I doubt it, though.

Q. What was the stick to which you refer?

A. This particular one was a helicopter.

(Testimony of C. Martin Welch.)

Q. A helicopter?

A. I don't recall that we made them in August, '49, but I am not positive, Mr. Swain. They have a flat bottom tank on that, say a flat bottom, but a horizontal tank, not a sloping one, or at least so had in the particular helicopter I made this stick for.

Q. I direct your attention to the last page, column three, line 35; you state:

"The body 1, tubes 9, 10 and the laminated plugs are preferably composed of butyrate plastic material which may be bonded and cemented together by amyl acetate as a solvent assuring proper chemical reactions [636] to that end."

Q. Did you use amyl acetate?

A. I tried it, yes.

Q. Does it work? A. It will work.

Q. I detect from the tone of your voice that it may not be the best, is that right?

A. As such, it could not be—it may not be the best, that's right. I used it in one of my formulae to make a cement, or I did use it at that time, I should say.

Q. Could I make a dipstick by simply using amyl acetate; that is, a dipstick that would be commercially satisfactory?

A. No, you could not simply by using it. You would have to use other parts, if that's what you mean. You couldn't just take amyl acetate and make a dipstick. You would have to have many other parts to form a dipstick.

Q. Well——

A. You mean to bond the end part with?

(Testimony of C. Martin Welch.)

Q. I mean to bond the ends.

A. You could temporarily bond the ends with one—with the use of a plug; is that what you mean, and a square tubing, to fit in the end?

Q. In the manner taught in your patent. Let's study your patent. Could I make a suitable dipstick taking the parts which are shown in your patent and cementing them together [637] with amyl acetate?

A. Yes.

Q. It would be commercially satisfactory?

A. Satisfactory, shall we say, as the first ones that I manufactured, yes.

Q. Are you referring, then——

A. To the first hundred.

Q. To the first order?

A. The first order and second order, possibly, I don't recall when we improved on the end sealing exactly, but it was around latter '48, or early '49, that we improved in our method of sealing it.

Q. Now, while we still have the patent in our hands did you ever mention the existence of this patent to Mr. Grindle before the date he got in touch with you, which I think you have identified as being a telephone call which you received while a new salesman was in your presence. Do you remember that instance?

A. Yes, I remember that instance.

Q. Did you ever mention the existence of a patent, to Mr. Grindle, prior to that time?

A. I gave him—I can't recall the exact date; I believe it to be in early '51 and he made a comment to me, "I see you have a patent."

(Testimony of C. Martin Welch.)

Q. Do you recall where that was? [638]

A. As near as I can recall, it was in the engineering offices of Pan American.

Q. Do you know who else was present?

A. William—that heard it? I wouldn't swear that anyone else heard it, but I know present in the room at that time were several other people, but whether they heard this remark or not I have no way of knowing.

Q. Was there anyone else in the immediate group that was discussing things with Mr. Grindle?

A. Yes. I seem to recall one fellow, Aboudera, that was in the particular corner of the room here.

Q. Was he a part of the discussion group that was going on about this dipstick?

A. Prior to Mr. Grindle's comment?

Q. Yes.

A. They were commenting on the color coding around the top of the dipstick and I had just submitted to them. And there again, may I establish that my records show that that was in early 1951 or I wouldn't be able to give you the date.

Q. Then if there was such a comment made by Mr. Grindle——

A. There were other times; I believe that he and Miss Simpson——

Q. Let's talk about this one time that you have testified about.

A. All right, sir. [639]

Q. If such a comment was made, is it your

(Testimony of C. Martin Welch.)

impression that Mr. Aboudera would have heard it?

A. I don't recall. I have no way of recalling that.

Q. But he was in the little group that was discussing it?

A. He was near us when we were speaking in the group; in that corner of the room, I would say.

Q. And he was taking part in the discussion about the color coding?

A. He had commented on it. I believe that—if I may add this—Mr. Grindle was—it could be that he wasn't in the group initially.

Q. Who wasn't in the group? Mr. Aboudera?

A. No, Mr. Grindle. It could be that he walked in because he wasn't employed at that time in that particular section of Pan American; he was employed in the flight engineering office, if I recall. This conversation on the patent was between Mr. Grindle and myself, as I recall.

Q. At the time that Mr. Fox communicated with you after Mr. Grindle's first telephone complaint to you, did you take Mr. Fox anything else than the drawing which you have identified as Defendant's Exhibit F? If I made a mistake in my question—said the first time. I mean at either of the two times that you saw Mr. Fox. Is that clear to you, Mr. Welch?

A. Frankly, no. I ask you to repeat it? [640]

Q. All right; I will repeat it. I believe you testified that Mr. Fox called you by phone and asked you to come to Pan American Airways?

(Testimony of C. Martin Welch.)

A. I did that.

Q. Shortly after Mr. Grindle communicated with you by phone, and subsequently you went to Los Angeles, that the exhibit which you have in your hand, the number of which I forget——

A. Defendant's Exhibit F.

Q. ——and took that to Mr. Fox; is that right?

A. That is.

Q. I am not trying to give you the whole substance of what occurred. I am merely——

A. I supplied him with one copy, yes.

Q. All right. Did you supply him with any other copies?

A. I don't recall of having supplied him with anything else but one photostat of this print, Mr. Swain, at that time.

Q. Did you have available to you at that time the drawing which Mr. Klein made, Exhibit R-1?

A. I can say that I very likely had it available to me, yes, a copy of the drawing.

Q. Did you take that to Mr. Fox? A. No.

Q. Did you ever show that drawing, Exhibit R-1, to anybody [641] at Pan American Airways prior to the institution of this litigation?

A. I can't remember of it ever having been necessary, so I logically wouldn't then, would I? I don't recall it, Mr. Swain. It is not logical that I would.

Q. Well, sometimes people do illogical things, and I would like to ask you whether you ever showed it to them or not?

(Testimony of C. Martin Welch.)

A. I don't recall having shown it to anyone at Pan American.

Q. Did you ever show it to Mr. Grindle?

A. Not that I recall.

Q. Can you be sure about that, Mr. Welch, that you never showed——

A. I can't be positive of it; I just don't recall it, Mr. Swain.

Q. Didn't Mr. Fox at that time show to you a copy of Pan American drawing No. D32.61114?

A. If you will add to that revision B Change, I will answer your question.

Q. I will accept the amendment, B Change, or A Change.

A. A Change, is it? Whatever it is, yes.

Q. Did that recall to your mind the existence of the Klein drawing?

A. There would be no requirement for it to have done so. [642] I don't understand your line of question, Mr. Swain.

Q. Yesterday afternoon you testified concerning a conference in our office at which my partner, Mr. Flehr, and Mr. Hohbach, Mr. Grindle, you and Mr. Freitas were present, I believe?

A. That is correct.

Q. And I wish you would go over again in your own words what you said—and I believe that yesterday you testified concerning the situation in which you had a dipstick in your hand and you pointed to two different drawings on the dipstick——

A. Using it only——

(Testimony of C. Martin Welch.)

Q. Would you go over that colloquy again for me?

A. I said, "Mr. Grindle can manufacture all the dipsticks he likes made like or from this drawing"—I pointed then to Defendant's Exhibit F—"but," I said, "I will under no circumstances enter into any agreement with Mr. Grindle to produce dipsticks to this drawing"—and I am referring now to Plaintiff's Exhibit 8.

Q. What did you mean when you said that?

A. Is that Exhibit 8? Excuse me. That is Exhibit 8?

Q. Yes, Mr. Welch. What did you mean when you said that?

A. Simply that I had no claim to a design such as this appearing on Plaintiff's Exhibit F—Defendant's Exhibit F.

Q. But you did claim rights to the design shown in [643] Plaintiff's Exhibit 8; is that right?

A. To the assembly of it, yes.

Q. And did you also mean to infer that if Mr. Grindle made a device in accordance with this drawing that he would do so in violation of your rights?

A. I can't answer that question for you yes or no. Will you rephrase it?

Q. Did you mean to infer that you would object to Mr. Grindle's making dipsticks as shown or as assembled in Exhibit 8?

A. I meant exactly what I said: I would enter into no agreement to make dipsticks to the referenced drawing.

(Testimony of C. Martin Welch.)

Q. Well, so logical here today. Is it logical to assume, then, that you wouldn't make an agreement—that you would not agree to it and therefore you would disagree, or you would object to his manufacturing those dipsticks? Isn't that a logical inference?

A. I simply stated I would enter into no agreement with him.

Q. I didn't get your answer.

A. I simply stated to him, to the group, that I would enter into no agreement with Mr. Grindle to manufacture dipsticks to the drawing that I referenced.

Q. That is all you meant?

A. That is all I said. [644]

Q. In other words, no one is to logically draw any inferences from that?

A. They can draw what inferences they please, Mr. Swain. I said what I meant, and that's all I said.

Q. All right, Mr. Welch. Isn't it a logical inference that you would object to his manufacturing dipsticks of the type shown in that drawing?

A. That might be assumed, yes.

Q. So that is one of the logical inferences, isn't it?

A. I don't know what you are getting at. Yes, it could be assumed, I think, logically.

The Court: I think when you are getting into the question of inferences, Mr. Swain, you may be

(Testimony of C. Martin Welch.)

technically intruding upon the province of the Court. The Court has to draw the inferences.

Mr. Swain: May it please the Court, I humbly apologize. I certainly had no intention of invading your province. In my enthusiasm I got out of mine.

The Court: No, I know you didn't.

We will take a recess now until 2:00 o'clock.

(Whereupon, an adjournment was taken to 2:00 o'clock p.m.) [645]

Thursday, March 1, 1956—2 P.M.

Mr. Swain: May it please the Court, Mr. Naylor has kindly consented that I may ask your Honor for permission to interrupt the cross-examination of Mr. Welch and put on a couple of other witnesses, three witnesses, whose testimony will be short. They are working men and they are people whom I have called, and they are here on their own time; so I wish to accommodate them as much as I can.

The Court: Very well.

(Previous witness temporarily excused from the stand.)

Mr. Swain: Mr. Aboudara.

JAMES BRADENBURG ABOUDARA

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you please state your name and occupation for the record?

A. My name is James Bradenburg Aboudara.

(Testimony of James Bradenburg Aboudara.)

I am an engineer for Pan American Airways.

Direct Examination

By Mr. Swain:

Q. How long have you been employed by the Pan American Airways? A. Total, 12 years.

Q. And do you know Mr. Eugene Grindle? [646]

A. Yes, sir.

Q. The gentleman sitting at this table?

A. Yes.

Q. How long have you known him?

A. Oh, about eight years.

Q. Are you familiar with a so-called dipstick used by Pan American Airways, a plastic dipstick of a liquid column type? A. Yes, sir.

Q. How long have you been aware of the existence of such a dipstick?

A. Approximately eight years.

The Court: Approximately how long?

The Witness: Eight years.

Q. (By Mr. Swain): And will you recite for the Court your earliest recollection of such a dipstick?

A. Well, 1948, when Gene was developing it.

Q. By "Gene," you mean Mr. Grindle?

A. Yes.

Q. And where is your office in the—or rather, where was your office, say, in 1948 at Pan American Airways?

A. In the west wing of the hangar upstairs.

Q. Is your office there now?

A. Well, it is changed around somewhat, but

(Testimony of James Bradenburg Aboudara.)

yes, it is still in the same wing.

Q. And was Mr. Grindle's desk in the same [647] area?

A. No, his desk is no longer there.

Q. Was Mr. Grindle's desk in that area in 1948?

A. Yes, sir.

Q. Mr. Aboudara, do you know Mr. Martin Welch? A. Yes, sir.

Q. The gentleman who is seated at the other table? A. Yes.

Q. Do you recall a conference or a meeting at your desk, at your office in Pan American Airways, in 1951 at which Mr. Welch displayed a dipstick and pointed out to you the color coding on the dipstick? A. No, sir.

Q. Do you recall any conference in which Mr. Welch may have participated with you and Mr. Grindle, in which—that is, in 1951—in which it was pointed out that there was a patent number appearing on the dipstick? A. No, sir.

Q. Did you ever see a patent number on one of the dipsticks supplied by Mr. Welch? A. Yes.

Q. When? A. Must have been in 1953.

Q. Why do you say it must have been in 1953?

A. Well, that's when I first had to procure some dipsticks or take steps to procure some [648] dipsticks.

Q. Why did you have to procure dipsticks at that date?

A. Well, I became involved with the 6-B project. We were just getting some airplanes for use in Alaska and I had to take steps to see that the air-

(Testimony of James Bradenburg Aboudara.)

craft and the Alaska line stations were equipped with such dipsticks.

Q. Did you ever have to procure dipsticks prior to this 6-B program you referred to?

A. No, sir.

Q. Do you recall when Pan American Airways instituted this 6-B program of which you speak?

A. In September or October of 1953.

Q. Have you at any time prior to this 6-B program discussed with Mr. Welch or heard Mr. Welch discuss with anybody else the existence of a patent on the dipstick?

A. No, sir.

Mr. Swain: That's all. Thank you.

Cross-Examination

By Mr. Naylor:

Q. Mr. Aboudara, what were your duties with Pan American in the year 1948?

A. I was an engineer, sir.

Q. And what was Mr. Grindle doing at that time for Pan American?

A. He was an engineer.

Q. And where were you situated in relation to Mr. Grindle in 1948? [649]

A. I was across the aisle and approximately two desks forward of his desk.

Q. But you were both in the same room?

A. Yes.

Q. And when did you first see Mr. Welch and when did you first make his acquaintance?

Testimony of James Bradenburg Aboudara.)

A. In 1948 when—well, I was introduced to Martin by Gene Grindle in 1948 when Gene brought him in there to—well, in the course of the development of the dipstick.

Q. Did you observe Mr. Welch pay any visits to Mr. Grindle's desk after the first introduction you had to him?

A. I didn't understand, sir. Say that again?

Q. Well, as I understand it, Mr. Grindle introduced Mr. Welch to you? A. Yes.

Q. And that was in the year 1948?

A. Yes.

Q. And I assume Mr. Welch was there for some time on that visit?

A. He was there several times.

Q. Well, that's what I mean. Did you see him on the occasion of his other visits to Mr. Grindle's desk? A. I may have seen him, yes.

Q. You didn't have anything to do with the dipsticks at that time? [650] A. That's right.

Q. Now would you say you saw him there one time more or more than one time?

A. Oh, I have seen him more than one time.

Q. Would you say that you saw Mr. Welch call on Mr. Grindle in the year 1949?

A. Yes, early in '49.

Q. When was Mr. Grindle transferred from the division in which he was positioned in 1948?

A. I don't know, sir; I don't remember.

Q. You don't know?

A. (Shaking head in the negative.)

(Testimony of James Bradenburg Aboudara.)

Q. Did you see Mr. Welch call on Mr. Grindle at Pan American in the year 1950? A. No.

Q. You did not? Did you see him at all in 1951?

A. See who?

Q. Mr. Welch. A. Not that I know of.

Q. Not that you know of?

A. Not that I know of.

Q. Did you see him in 1952? A. No.

Q. Do you have any way of being positive about it? A. No, I don't. [651]

Q. Do you have any way of being positive about it as to 1951, that you did or did not see him?

A. No, I don't.

Q. Now as I understand it, your first connection with dipsticks actually occurred in 1953, didn't it?

A. Yes, sir.

Q. And was that assigned to you as one of your regular duties as an engineer for Pan American?

A. Yes.

Q. Namely, the matter of procurement?

A. That's right.

Q. Of the DC-6 dipstick, is that right?

A. That's right.

Q. And was that your first actual acquaintance with the dipstick as a product purchased and used by Pan American? A. Yes.

Q. Had you paid any particular attention to dipsticks prior to this assignment in 1953?

A. No, sir.

Q. I think that's all. Excuse me, just one moment.

(Testimony of James Bradenburg Aboudara.)

Just one further question, Mr. Aboudara. Do you recall having conversations at Pan American with Mr. Welch in reference to a footstool?

A. Yes.

Q. And when did that occur? [652]

A. I don't know. I could find out, but I don't remember the date. It's '50—I don't know, sir.

Q. You have no independent recollection of when it was? A. That's right.

Q. Did you have one conversation with Mr. Welch concerning footstools, or more than one conversation?

A. I think I have had—well, it was more than one.

Q. And was that a project that was assigned to you? A. Yes.

Q. And these footstools were for use in aircraft, I assume? A. That's right.

Q. What were you seeking of Mr. Welch in that connection?

A. The procurement, some design work and converting or fabrication possibilities.

Q. But you can't presently fix the year?

A. That's right.

Mr. Naylor: Thank you. That's all.

Mr. Swain: No further examination.

The Court: You may be excused.

(Witness excused.)

Mr. Hohbach: Mr. Seagrave.

MARSHALL THORNE SEAGRAVE

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you please state your name [653] and occupation for the record?

A. My name is Marshall Thorne Seagrave. I am a staff engineer, Pan American Airways.

Direct Examination

By Mr. Hohbach:

Q. Do you know Mr. Grindle? A. Yes, sir.

Q. Is he the gentleman sitting here at this table?

A. Yes.

Q. How long have you known him?

A. Nine years.

Q. Are you familiar with the dipsticks used by Pan American? A. Yes, sir.

Q. Do you know whether Mr. Grindle has had any connection with the dipsticks?

A. Yes, sir.

Q. Did you have any connection with Mr. Grindle when he was working on the dipsticks?

A. Yes, sir.

Q. In what particular connection?

A. At the particular time I was assigned to the same engineering group Mr. Grindle was in and during the course of that period I had several conversations with Mr. Grindle about this particular dipstick development.

Q. Did you ever make any trips with him?

A. Yes. [654]

Q. On what occasion?

(Testimony of Marshall Thorne Seagrave.)

A. On an occasion of a visit to San Francisco for two different purposes, one on my account and one on his, which I believe to be the early part of May in 1948.

Q. How do you fix that date?

A. I fix it with respect to the purpose of my visit to a particular project that I was engaged in, in engineering work for Pan American, at that time. The confirmation of that particular engineering work project that I refer to is dated in a published report which describes the nature of this project, and the purpose of my visit in connection with this project was prior to the issuance of this report and was for the obtaining of information relative to certain equipment which had to be used to provide data to be included in this report.

This visit was necessarily prior to the issuance of this report.

Q. What date does the report carry?

A. It carries the date of the month of May, 1948; the specific day of the month is not specified in the report.

Q. But you recall particularly that this trip must have taken place some time before this report was made, is that correct?

A. Yes, it could not have been otherwise.

Q. Could you tell us what occurred in that [655] trip?

A. Yes. Mr. Grindle and I came to San Francisco from the Pan American base in my automobile, and we first went to a plastics fabricating establishment in the neighborhood of the Bay

(Testimony of Marshall Thorne Seagrave.)

Bridge Terminal here in town, I think it was called the American Moulding Company. We went there for the purpose of Mr. Grindle's investigating their capabilities and their willingness to take on the manufacture of this dipstick that you refer to.

Q. Did Mr. Grindle have anything with him at the time?

A. He had a prototype of this dipstick.

Q. Did he have anything else?

A. I believe he had a sketch or drawing showing in detail the cross-section of this dipstick prototype.

Q. Can you describe the dipstick or the prototype that he had with him?

A. Yes, it was in exterior appearance a square rod approximately a yard long, rectangular in section, or square, and it had a central core which ran the length of it, and this core, I believe, was also square. It was smaller than the inside diameter of this square tubing that forms the outside with all of this rod, and separated from contact with the inside of the wall by plastic shims located in the corners. The resultant shape being that there were four longitudinal columns, empty columns, one on each side opposite each flat space of the square rod. [656]

Q. Could you see anything inside of the prototype?

A. Yes, there were graduated scales.

Q. And upon what were the graduated scales mounted?

A. I would say they were printed on paper which appeared to be secured to the outer face of this core.

Testimony of Marshall Thorne Seagrave.)

Q. Do you remember the construction on the end of the prototype? A. Yes.

Q. How were they constructed?

A. They appeared to have been plugged by a retainer which was secured by cement or similar adhesive, and these columns that ran longitudinally on each side of this thing were open and not plugged. That is my recollection.

Q. I hand you a copy of Plaintiff's Exhibit 6. Does this look like the drawing that Mr. Grindle had with him? A. Yes.

Q. What did the drawing show, do you remember, at that time?

A. This drawing was a plan for a proposed extrusion. It showed the cross-section of such an extrusion.

Q. Do you recall that independently of seeing this drawing at this time? A. Yes.

The Court: Identify that exhibit, please?

Mr. Hohbach: Plaintiff's Exhibit—the witness has just been referring to Plaintiff's Exhibit 6.

Q. (By Mr. Hohbach): I hand you Plaintiff's Exhibit 6. Does this resemble the prototype of which you spoke? A. Very definitely.

Q. Does this have a wood filler just like the prototype? A. It appears to have.

Q. Was the prototype about this same size?

A. Yes.

Q. Same length? A. I would say so.

Q. How about the cross-sectional area?

A. I would say it was that.

(Testimony of Marshall Thorne Seagrave.)

Q. Generally the same size? A. Yes.

Q. You stated you went to visit the American Moulding Company. Can you tell us what occurred when you visited American Moulding?

A. We were taken on a tour of their plant and shown the machines they use for fabrication of various plastic articles in two categories—compression moulding and injection moulding. We saw numerous examples of the die maker's art and in various stages of preparation, manufacture and sale, and the manager of the plant described to us the way that they were used, some of the problems that they had in using them, and we were shown a quantity of the bulk raw material [658] used to feed these two different types of machines.

Q. Did Mr. Grindle show the prototype and the drawing he had with him to this gentleman?

A. Yes.

Q. And what did he ask this gentleman?

A. My recollection is that the general tenor of the conversation with the manager of this plant was whether or not the American Moulding Company would be interested in manufacturing dipsticks according to the model represented by the prototype.

Q. And what did he say, do you remember that?

A. He told Mr. Grindle that when the required quantities became evident, that the quantity was too small to interest his company.

Q. Did he suggest anyone else that he could go to for getting an extrusion? A. He did.

Q. Do you know who he suggested?

Testimony of Marshall Thorne Seagrave.)

A. He mentioned a Mr. Welch.

Q. Is he the Defendant here in court sitting at this table? Of course you wouldn't—I am sorry.

A. I am not acquainted with Mr. Welch.

Q. Can you give us a brief resume of your education?

A. Yes. I have had seven years of university training, largely in scientific fields. [659]

Q. Did you study any chemistry during that time? A. Yes.

Q. What type of chemistry did you study?

A. All of the general inorganic chemistry, including analytical branches and approximately four and a half quarters of organic chemistry.

Q. Does your work at Pan American involve elastics? A. To some extent.

Q. Are you familiar with Ethylene Dichloride?

A. Yes.

Q. What is it?

A. A chlorinated hydro carbon.

Q. Are you familiar with cellulose acetate butyrate? A. Yes.

Q. What is it?

A. It is a compound ester of the acetic and butyric acids.

Q. Is cellulose acetate butyrate soluble in ethylene dichloride? A. Yes,

Q. Can ethylene dichloride be used to form a bond between two pieces of cellulose acetate butyrate?

A. It can be used as an agent for that purpose.

(Testimony of Marshall Thorne Seagrave.)

Q. Can you tell us what takes place when such a bond is formed?

A. It is analagous to causing the union of two lumps of [660] sugar by the application of water to the surfaces of these two lumps that would be placed in contact with each other. The action of the water in the case of the sugar is to dissolve it and while it is in a fluid or semi solid state, pressure is applied between the two surfaces that are dissolved a fluid union is permissible. The flow of the dissolved sugar in this case would be exchanged between the parent body of one cube or lump and on one side of it, and that on the other, and if they are maintained in close proximity for a sufficient time for this fluid union to take place, and the solvent can then diffuse itself further into each parent body, the semi solid condition will subside back to the original solid condition and a mixture has been effected. It is a physical union and not necessarily any chemical change involved.

Q. And the solvent will gradually evaporate from the union?

A. It is likely that it will; if it is a solvent, it is also likely it is diffused to an unimportant extent, or unimportant concentration, in any spot. Elsewhere in the article, that is, that it's dissolved

Q. Is a bond formed in this manner likely to fail within a period of time?

A. If it is properly made, no.

Q. Did you give any information to Mr. Grind

(Testimony of Marshall Thorne Seagrave.)

at the time he was working on the dipstick in relation to plastics? [661]

A. I believe it is probably likely that I suggested some reference material for his information that he could refer to authorities on the use of plastics and procedures that are common in working with them.

Q. You stated that these procedures are common. Would the bonding of two pieces of tenite together be rather a common problem?

A. Well, it is certainly well embraced and described in fairly voluminous literature which has been in print for a number of years. It is available to the general public.

Q. And as far as you recall, it was available in 1948, is that correct? A. Very definitely.

Mr. Hohbach: That's all.

Cross-Examination

By Mr. Naylor:

Q. Mr. Seagrave, who was the gentleman at American Moulding with whom Mr. Grindle talked in your presence?

A. He was the manager of their plant. I do not recall his name.

Q. You do not recall his name. May I suggest that it was Mr. Robb? A. Yes.

Q. Does that refresh your recollection?

A. Yes, it sounds familiar.

Q. Now you spoke of Mr. Grindle seeking the assistance of [662] American Moulding in producing the dipstick according to the prototype which you likened to Plaintiff's Exhibit 5?

(Testimony of Marshall Thorne Seagrave.)

A. M-hm.

Q. Is that your testimony?

A. If you wish to make a technical exception: I would like to amend that testimony.

Q. Yes, sir.

A. All right. The prototype that you hold in your hand, or rather a replica of the prototype, is a fabricated unit; it has been pieced together by separate items of plastic and wood and made into a unit by cementing or gluing it together. The article which Mr. Grindle sought to have produced would have been one piece, not fabricated out of several pieces like this, but pushed through a die in a plastic state, extruded is the proper term, so that it would be made all integrally in one piece, and therefore the prototype is not a dead ringer for the product that Mr. Grindle sought to have made.

Q. Was he seeking the production by American Moulding of the complete assembly or simply the extrusion?

A. I believe that it was the extrusion.

Q. He was not, then, as I understand it, seeking a quotation or an expression of interest from American Moulding in their production of the complete assembly that you say he exhibited to [663] them? A. I can't answer that.

Q. But it is your understanding that he was seeking their assistance in producing a satisfactory extrusion? A. I believe so.

Q. And I assume that the conversation or some

(Testimony of Marshall Thorne Seagrave.)

part of the conversation centered about Plaintiff's Exhibit 6, did it not?

A. I would say a good deal of it did.

Q. A good deal of it? A. Yes.

Q. And did Mr. Grindle explain within your hearing to Mr. Robb the nature and characteristics of that extrusion? A. I believe so.

Q. Well, did he make any explanation of it to Mr. Robb? A. Certainly.

Q. And you say a considerable portion of the conversation centered about the print, Plaintiff's Exhibit 6?

A. The main purpose of Mr. Grindle's visit to this plant was to obtain information on the production of this prototype of this extrusion.

Q. And American Moulding declined to do anything about it, didn't they? A. I believe so.

Q. And were you present when they recommended that Mr. Grindle see Mr. Welch about [664] it? A. Yes.

Q. Did he make any recommendations as to any other people? A. Not that I recall.

Q. Did you have any degree of familiarity with the dipsticks that were currently in use as of the time of this San Francisco visit to American Moulding? A. Yes.

Q. Would you mind describing them to the court, please?

A. One particular type, which I believed to be in the most general use at that time, was a square

(Testimony of Marshall Thorne Seagrave.)

rod made of wood with numerals and graduations imbedded or impressed in the wood.

Q. Mr. Seagrave, may I show you Defendant's Exhibit O-1 and also Defendant's Exhibit N-1 and ask you, sir, if it was either of those two?

A. Well, I would say that the articles in general use for this purpose were certainly very similar to this.

Q. No substantial difference that you can recall, is there? A. No.

Q. Prior to the visit with Mr. Grindle to American Moulding, had you seen in use in connection with the airlines, the various airlines, dipsticks such as Defendant's Exhibit K-1? A. No.

Q. And Defendant's Exhibit M-1?

A. No, I don't think I recall that one.

Q. And Defendant's Exhibit L-1? [665]

A. I believe I have seen something similar to this.

Q. Yes. Now I would like to ask you, was an indication that Mr. Grindle was seeking to find a satisfactory replacement for sticks of this general nature that were in use as of 1948?

A. Would you mind restating the question?

Q. Yes. At the time of your first visit to American Moulding with Mr. Grindle concerning the dipstick, was it your impression or understanding that Mr. Grindle was actually working on a project for Pan American looking for a suitable replacement for these sticks in common usage? A. Yes.

Q. Now you spoke about the chemistry of plas

Testimony of Marshall Thorne Seagrave.)

Q. Yes, and you expressed the point of view that ethylene dichloride was a suitable agent for bonding cellulose acetate butyrate. Is that a correct statement of your testimony? A. I think so.

Q. Is your point of view based on theory or practical experience? A. Both.

Q. Have you actually effected a bond between two separate pieces of cellulose acetate butyrate with the use of ethylene dichloride alone?

A. Yes.

Q. When? [666]

A. Specifically as to date?

Q. Yes.

A. I can't tell you. I can tell you within two or three years, perhaps.

Q. Give us your best recollection on that?

A. 1950 or '51.

Q. And what was the nature of the product that you were working on at that time?

A. It was an adaptation of a sliding scale which of necessity had to be transparent and was to be placed behind a magnifying glass which in turn was to be placed over a cathode tube, and instrument we use for engine analysis called an engine analyzer.

Q. I see. Now you did not effect such a bond in the dipstick art, did you? A. Not me.

Q. That's what I say—you did not?

A. No, I did not.

Q. I assume therefore that you have never effected such a bond between two members or pieces of cellulose acetate butyrate for use in the environ-

(Testimony of Marshall Thorne Seagrave.)

ment of the dipstick that we are talking about, is that true?

A. As far as I know, I have never manufactured a dipstick in my life.

Mr. Naylor: I see. I think that's all, your [667] Honor.

Redirect Examination

By Mr. Hohbach:

Q. After this gentleman at American Moulding recommended Mr. Welch, did you go and see Mr. Welch that day? A. No.

Q. What did you do?

A. We carried out the other half of our joint purpose of coming to San Francisco, which was visit on my part to, I believe, Braun-Knecht-Heimann, to determine whether or not they could make available some gas analysis equipment to us. After that, we returned to our base.

Q. You have formed a bond between cellulose acetate butyrate and another piece of cellulose acetate butyrate by ethylene dichloride is that correct?

A. Yes.

Q. Would the formation of a bond in a dipstick be any different from the formation that you made?

A. If the cellulose acetate butyrate is not adversely effected by the dipstick's environment, by immersion in gasoline and so on, I don't believe that there is any reason to believe that two pieces fused together by an agent which subsequently has departed, should change their chemical action or chemical reaction to a gasoline environment or wherever else the dipstick might be used.

Testimony of Marshall Thorne Seagrave.)

Q. Do you know whether cellulose acetate butyrate is particularly adapted for use in [668] hydrocarbons?

A. That would depend on the hydrocarbons. We have already put on record that one hydrocarbon is solvent for this plastic.

Q. I am speaking of aviation gasoline.

A. It's relatively inert.

Mr. Naylor: That's all, Your Honor.

The Court: You may be excused.

(Witness excused.)

Mr. Hobach: Mr. William Burfeind.

WILLIAM BURFEIND

witness called on behalf of the Plaintiff; sworn.

The Clerk: Will you state your name and occupation for the record?

The Witness: William Richard Burfeind. I am Senior Engineer with Pan American World Airways.

Direct Examination

by Mr. Hohbach:

Q. Do you know Mr. Grindle?

A. Yes, I do.

Q. Is he the gentleman sitting at this table?

A. Yes.

Q. How long have you known Mr. Grindle?

A. Oh, approximately nine years.

Q. Are you familiar with the dipsticks used by an American? A. I am.

(Testimony of William Burfeind.)

Q. Did you make a test on the dipsticks? [669]

A. I made a test. It wasn't specifically on the dipsticks, it was to determine if we had any inaccuracies either in the dipsticks or the dipstick calibrations.

Q. On what plane did you make this test? Did you make it on the plane or on the dipstick?

A. No, it was done, the test was made on a Boeing B-377 airplane.

Q. Did anyone work with you in connection with the test?

A. Yes, there were several people. Certain people worked with me in conducting the test and other people participated in the test as witnesses, primarily as witnesses to attest of the accuracy of the test.

Q. Was Mr. Grindle called in on the test?

A. He was.

Q. Why was he called in on the test?

A. Well, he represented the flight engineering group.

Q. Why would they be interested?

A. Well, they were the people that had questioned the inaccuracies of the stick calibration. It was an operational question to combine—question of inaccuracies from the product group and the flight engineers group.

Q. Did you call Mr. Grindle in on the test?

A. Either I did myself or one of the operations

(Testimony of William Burfeind.)

engineers did. I don't recall who personally contacted Mr. Grindle.

Q. Where were you when Mr. Grindle arrived on the test? [670]

A. To the best of my recollection, I was on the wing of the airplane checking the establishment of the test conditions before the start of the test.

Q. Could you describe what you were going to do in this test?

A. Yes, we were first going to establish the empty condition of all the fuel tanks or all the wing fuel tanks of the airplane and then proceed to put in known quantities of fuel in each tank and then cross-check these quantities with the stick and in that way—well, rather than—we had, in fact we had a special stick made up that, rather than show fuel quantities it showed the elevation of the fuel in the tank in inches, and in that way we could cross-check the various calibrations on the stick.

Q. Why did you need additional people to help you on the test?

A. Well, a test of this nature is fairly important, and they didn't aid in the testing as much as they did witness, to attest to the accuracy of it.

Q. Now do you remember Mr. Grindle arriving on the scene? A. Yes.

Mr. Naylor: Could we fix a date.

Mr. Hohbach: Yes, that is coming up.

Q. (By Mr. Hohbach): Did you say anything to Mr. Grindle when he arrived at the scene? [671]

A. Well, at some time after Mr. Grindle arrived

(Testimony of William Burfeind.)

at the scene, I happened to look at the stick and mention to him very casually that the stick showed that it was patented and showed a patent number.

Q. Is the stick you were using, this dipstick you were using in the test?

A. Yes, it was one of the sticks. In fact, we had several sticks; we had both a normal stick with a normal calibration on it, plus this special stick that showed the calibration in inches and fractions of an inch.

Q. What did Mr. Grindle say when you conveyed this information to him?

A. Well, I can't quote him verbatim, but I know he was very amazed and astounded that the stick was patented, and as far as I know, it was the first time he had been aware of this fact.

Mr. Naylor: Now I move that may go out, Your Honor.

The Court: It may go out.

Q. (By Mr. Hohbach): Mr. Grindle expressed surprise, though, is that correct?

A. Yes, definitely.

Q. How do you fix the date of this test?

A. Well, I have with me my file and I can give you the exact date of the test from the rough draft of my test data, and that date is the 28th of September, 1953.

Q. Can you from that report tell us who was present at that [672] test?

A. Well, there was a Mr. H. J. Hackett, myself—now wait a minute. I got a list of people that

(Testimony of William Burfeind.)

were contacted. Gene Grindle and Howard Ohliger.

Q. Now are you positive that that was the date that the test was conducted?

A. Yes, because at the time I was conducting the test with the dipstick on the wing, Mr. Ohliger was in the cockpit taking cockpit indicator readings, and I have here his rough draft showing the same date, the date that the test was conducted on, September 28, 1953.

Q. Did you have anything to do with the dipsticks before you made this test?

A. No, not as part of my work.

Q. Well, how—did you ever have any contact with the dipsticks before that time?

A. Well, just in casual conversation with Mr. Grindle.

Q. Could I see that, please?

(Conversation among counsel out of hearing of the Reporter.)

Mr. Hohbach: Your Honor, I would wish to state that these are personal files of this individual and we don't wish to introduce them in evidence unless Mr. Naylor insists.

Mr. Naylor: I have no purpose.

The Court: I won't insist providing there is nothing there immaterial that Mr. Naylor may want to bring up. [673]

Mr. Naylor: I am satisfied from this that it was September 28, 1953. Excuse me, Your Honor.

(Testimony of William Burfeind.)

Cross-Examination

By Mr. Naylor:

Q. Mr. Burfeind, are you acquainted with Martin Welch, who is sitting here in Court? A. I am.

Q. How long have you known Mr. Welch?

A. I met him in this—it was just subsequent to September, to the time I conducted this test; the exact date I don't recall.

Q. Were you aware of the fact that Mr. Welch was manufacturing and delivering dipsticks to Pan American prior to September 28, 1953?

A. Yes.

Q. You were aware of that fact? A. Yes.

Q. And I assume from that that you had seen the dipsticks, had you not? A. No.

Q. You had not?

A. No, I had no occasion to see them prior to that.

Q. Did your office have any connections with Mr.—excuse me. Did your office have any contact with Mr. Welch concerning dipsticks?

A. Yes, there was one question that came up approximately the [674] same time, and that was a question of a repeat in the calibration of the stick.

Q. I see. So that you were aware of the fact that these sticks were being made and purchased and used by Pan American? A. Oh, yes.

Mr. Naylor: I see. That's all.

Mr. Swain: That's all.

The Court: You may be excused.

(Witness excused.)

Mr. Swain: That concludes the three witnesses to which I referred, and now are you ready to go back to Mr. Welch, Mr. Naylor? Unless you have somebody you want to call?

Mr. Naylor: No, I haven't.

C. MARTIN WELCH

recalled

Cross-Examination

(Resumed)

By Mr. Swain:

Q. Mr. Welch, did you have an opportunity to check through your patent during the noon hour?

A. During the limited time I read it over.

Q. I see. And do you recall on—well, let me ask you, Mr. Welch: Were you able to read through from one end to the other?

A. I read only this first page and the second part down to the claim. That's as far as I was able to get before the time came to come back. [675]

Q. I see. And in that portion which you read, were you able to find anything which suggested any method of inserting the end plugs other than that which I pointed out this morning on the first page, column 2, about the middle of that column?

A. No, I found no other manner.

Q. Mr. Welch, I believe that you have testified concerning Exhibit 35, which is a quotation from Plastic Process Company, Inc., which I believe you have testified was never delivered to Pan American

(Testimony of C. Martin Welch.)

Airways, and does the price of \$179 thereon indicate the closed price by Plastic Process to Pan American Airways per unit?

A. Of the plastic parts, Mr. Swain, yes.

Q. I see. At the time the various copies of the drawing D-32.061.114 were handed to you, was Mr. Grindle's name appearing as designer or after the notation "Designed." Do you recall?

A. Would you rephrase that question? Do you recall? I disagree with the first part of it. I don't remember it being handed to me. You mean the one I received in the mail? I would like you to clarify it.

Q. Well, maybe I can make it more simple. I will hand you Exhibit P and ask you if Mr. Grindle's name appears there after the legend "Designed."

A. That's right, it does. [676]

Q. And I will hand you a copy of Exhibit 8 and ask you if it also appears thereon?

A. It does.

Q. In the same manner. Did you ever protest to Mr. Grindle of the Pan American Airways that the designation was erroneous?

A. I was never concerned with it.

Q. I beg your pardon?

A. I was never concerned with protesting to Pan American or to Grindle about it.

Q. You were conscious of it at all times?

A. I am reasonably positive that I noticed it was on there shortly after the first copy I received, yes.

(Testimony of C. Martin Welch.)

Q. Was it on every copy that you received from an American Airways, do you recall?

A. Unless it were taken off of the original film, in the copies it would have to be on every copy I received.

Q. Including, let us say, the drawing which specified the Boeing 377 or whatever it is, dipstick?

A. I assume that it was, yes.

Q. Did you give Mr. Vale a copy of that drawing?

A. Yes. I noticed one in his file. I didn't remember exactly whether I noticed one in his file when looking through it the other day.

Q. Well, I will point out to you a drawing which I have [677] removed from the Baldwin Vale file, which is Exhibit H-1, and ask if that is a B-377 dipstick drawing? A. That's correct.

Q. Does Mr. Grindle's name appear on there as designer? A. Yes, it does.

Mr. Swain: That's all I have.

Redirect Examination

by Mr. Naylor:

Q. Do you have the copy of the patent up there, Mr. Welch? A. Yes.

Q. Mr. Swain directed your attention on cross-examination to the description in column 2 of page of Plaintiff's Exhibit 2, which is a soft copy of his patent, and particular attention was directed to the composition of the laminated plug. Do you

(Testimony of C. Martin Welch.)

recall that interrogation? A. Yes, I do.

Q. You recall the questions he put to you?

A. Yes.

Q. Now what was the actual method that was followed in the production of dipsticks with the laminated plug? How did you assemble the physical structure?

A. Put a small amount of cement into the opening we were to seal and then put in a layer of—one of these laminated plugs, we call them.

Q. Are you referring to one of the plugs such as you identified [678] here yesterday?

A. Yes, I am. We put it—

Q. Excuse me. You say you put in one of the laminations or wafers? A. Wafers.

Q. And what did you do next?

A. Add more cement to the cavity and add another, as you call it, wafer.

Q. Or layer?

A. And add still another, and then put another wafer in and then under quite high pressure, we condensed the three units.

Q. Did you put the pressure on the topmost dipstick before applying any outside sealing material?

A. No.

Q. When did you put the pressure on?

A. After the particular plugs had been put into the cavity and layers of cement had been—daubs of cement had been in between each layer.

Q. Did you ever make a dipstick in which you first build up a sandwich, if you will, or a lamination

(Testimony of C. Martin Welch.)

plus, and then inserted it in the cavity at the end of the stick?

A. No, I have never made them that way.

Q. Well now, insofar as the patent, if it does—insofar as the patent speaks of that practice, is that your language [679] in the patent or is it Mr. Vale's?

A. Well, this whole patent is very definitely Mr. Vale's language, Mr. Naylor.

Q. Well now, let's take even Mr. Vale's language. Let's assume that, working with the materials that we are talking about, if you were going to go through the procedure of building up a lamination, and by "lamination" I mean a plastic disc or wafer and then a layer of cement, another plastic wafer or disc, cement and so on—and then you then had an assembly or a built up plug, and let us assume that in strict accordance with Mr. Vale's language that that assembly were put in the end of the stick; what would happen when pressure was applied to it?

A. The assembly would have to be a wet assembly. You would have to have wet cement, moist cement on it, and then as you put the pressure on, the parts would be squeezed together and exude the material out the sides, as Mr. Vale so adequately describes would cause the cement to go against the inner surfaces of the body and into the intervening interstices, as he calls it.

Q. In other words, the cement, to put it in simple language, would be squeezed out between the layers, would it not?

(Testimony of C. Martin Welch.)

A. That's right, and fill out the cavities that remain.

Q. And if you had allowed the plug to dry, could you do that?

A. Under no circumstances. [680]

Q. I mean harden. Now with reference—your attention was directed, Mr. Welch, to page 3 of the patent and a particular reference was made to the amylacetate. Is it not a fact that, after mentioning amylacetate, this patent, in lines 40 to 43, makes reference to equivalent substitutions that may be available in the plastic art?

A. It very definitely says that, yes.

Q. And the language occurs in lines 40 to 43, does it not?

A. Yes, I would say. [681]

* * *

Q. (By Mr. Naylor): Mr. Welch, Mr. Swain asked you a number of questions concerning the quotation made by Plastic Process Company, under date of May 11th, 1946, to you, which is Plaintiff's Exhibit 35. As I understand it, that quotation was to you, it was sent to you rather than—sent to you by Plastic Process? A. That's correct.

Q. And the quotation as such was never tendered to Pan American?

A. No, both the white and pink, I believe, and the yellow copies of it were in my files.

Q. Did you ever have an understanding from anything that was said or written to you by Mr. Wenk or Mr. Kerr that Plastic Process Company

(Testimony of C. Martin Welch.)

as distinguished from yourself was interested in making a dipstick assembly?

A. Did I—would you repeat that?

Q. Did you ever understand that Plastic Process Company was interested in making a dipstick assembly as distinguished from the parts?

A. No, they never were. It was—in making an assembly—they were never interested in making an assembly. [682]

Mr. Naylor: May I see Plaintiff's Exhibit 12, Mr. Clerk? That's the Pan American letter.

Q. (By Mr. Naylor): Mr. Welch, directing your attention to Plaintiff's Exhibit 12, which is the June 10, 1948, letter from Pan American, and specifically to paragraph 2 of that communication, is there a reference there to an alteration of the design? A. Yes, there is, Mr. Naylor.

Q. And is there a reference in that paragraph to the original sample?

A. Yes, there is, Mr. Naylor.

Q. And is there a reference there to the nature of the alteration that had been made by Pan American?

A. The reference is there that they request that I incorporate solid plastic blocks in each end for additional strength. That is the alteration from the original sample.

Q. And is there a reference in that paragraph to an increase in price suggested by Pan American because of that alteration?

A. It further states, "We are assuming that this change will not increase the cost by more than 25

(Testimony of C. Martin Welch.)

cents per unit. Please advise if any further price adjustment is necessary."

Q. I direct your attention to what purports to be the original of Plaintiff's Exhibit 11 in this case and will ask you if you can identify that. [683]

A. Yes, this is the original purchase order that we received from Pan American.

Q. And that is for 100 dipsticks, the original order? A. That's right.

Q. Now specifically, will you note the price as it is typed in the right-hand column of the purchase order? A. I do notice the price.

Q. And what price is stated there?

A. \$3.25. There has been an erasure on that price. I would like to call that to your attention.

Q. Is that obvious from the original?

A. Quite obvious.

Q. Now you had quoted, actually, \$3, had you not? A. My original quote was for \$3, yes.

A. My original quote was for \$3, yes.

Q. So this is a reflection of the suggested increase in the price of the stick, is that correct?

A. One could certainly assume that the price has been changed from some figure to \$3.25, yes.

Q. But the legible figure is \$3.25 ?

A. That is what is very legible, yes.

Mr. Naylor: I think we might offer that as a Defendant's Exhibit next in order, Your Honor, just because it is the original and shows that erasure on its face.

The Court: Let it be received.

(Testimony of C. Martin Welch.)

The Clerk: Defendant's Exhibit T-1 in [684] evidence.

(Thereupon original copy of letter referred to above was marked Defendant's Exhibit T-1 and received in evidence.)

The Witness: May I have permission to call my attorney's attention to something?

The Court: Certainly.

The Witness: Mr. Naylor, if I may, Mr. Robb in the courtroom. I just saw him walk in. I know he is quite a busy man and I asked him to come down here, which he did, just upon that little phone call I made.

Mr. Naylor: Thank you. I am just about through with my redirect examination.

The Witness: Thank you. I wanted to call that to your attention.

Mr. Naylor: Thank you, Mr. Welch.

The Witness: I would like further, Mr. Naylor, to call your attention that the representatives of the Tennessee Eastman Corporation, one of the head men of that company, is unable to come down today, but he stipulated to me over the 'phone that he would be glad to appear in court tomorrow and state that they—that ethylene dichloride is not recommended—

Mr. Swain: Just a moment, please.

Mr. Naylor: Thank you. I will agree that part of it may go out, Mr. Swain. [685]

The Court: It may go out.

(Testimony of C. Martin Welch.)

Mr. Naylor: Thank you for that advice in the connection. I would like to call Your Honor's attention to the fact that we are trying to crowd this little bit to wind up today, if it is humanly possible and that accounts for some of this crisscross of conversation that is going on.

The Court: Very well.

Mr. Naylor: I wonder if I might withdraw Mr. Welch from the stand for the purpose of accommodating Mr. Robb. I have probably not any more questions from Mr. Welch, but at least one or two to wind up the redirect. Any objection?

The Court: Any objection?

Mr. Swain: No, Your Honor.

The Court: All right, you may stand down.

(Witness temporarily excused.)

Mr. Naylor: Mr. Robb.

JOHN G. ROBB

a witness called on behalf of the Defendant; sworn.

The Clerk: Will you please state your name and occupation for the record?

The Witness: John G. Robb, Plastic Engineer, for American Moulding Company, in San Francisco.

Direct Examination

By Mr. Naylor:

Q. How long have you been connected with American Moulding, Mr. Robb? [686]

A. Since 1941.

Q. Since 1941?

A. Yes, sir.

Testimony of John G. Robb.)

Q. And what has been your position with American Moulding?

A. As a Plastic Engineer I have been doing the signing, tooling and estimating on jobs and scheduling.

Q. And as part of your duties, do you meet new customers who come in with plastic problems?

A. Some of them, yes.

Q. Now directing your attention to the month of May in 1948, were you in a position that required you to meet people coming in with problems to American Moulding? A. Yes.

Q. I would like to ask you if in that month you had occasion to be visited by Mr. Eugene Grindle of Pan American Airways?

A. I couldn't recall the name, but a man from an American did come, yes.

Q. And do you see that gentleman here in court?

A. Since that many years, I see so many people, I wouldn't recognize him.

Q. But you do recall a gentleman coming in from Pan American? A. Definitely.

Q. Do you recall the nature of his visit?

A. He came in to secure some plastic tubing for an instrument to measure gasoline in airplane tanks, and we were not making [687] plastic tubing, so I referred him to Mr. Welch, who represented Plastic Process from Los Angeles, on the thought he might have some tubing.

Q. Now for what period of time was this gentleman with you on the occasion of that visit?

(Testimony of John G. Robb.)

A. Just briefly, maybe five minutes or ten minutes.

Q. And did he exhibit anything to you?

A. I don't recall him having done anything except ask for plastic tubing.

Q. I would like to show you specifically Plaintiff's Exhibit 6, which is a print of a drawing that has been identified here, and will ask if you recall seeing that particular print in connection with the purpose of the visit.

A. I don't recall having seen it.

Q. You don't recall having seen it? A. No.

Q. Did the gentleman exhibit to you anything in the way of plastic tubing or a sample device identified as such?

A. Not to the best of my memory.

Q. Not to the best of your memory?

A. That's right.

Mr. Naylor: I think that's all.

Cross-Examination

By Mr. Naylor:

Q. What did this gentleman from Pan American ask you? [688]

A. As I said before, as I recall it, he asked me for some plastic tubing, because we were in the extrusion business, and he assumed we could make it, and we did not make any tubing like that.

Q. What kind of tubing did he want?

A. Lucite or acrylic. Lucite is a trade name for acrylic.

(Testimony of John G. Robb.)

Q. What shape and size did he want?

A. I wouldn't recall, that long. I see too many people in that job.

Q. You do actually recall him asking you for some extrusion, is that correct? A. Yes.

Q. And that's all you recall?

A. That's right.

Q. You don't recall the size and shape or——

A. No.

Q. You don't manufacture any type—you don't supply any type of extrusion, is that correct?

A. Not that type.

Q. Square, round?

A. At that time we had no stock items.

Q. Could you procure the items of that type?

A. No, we would have had to go into expensive tooling program to make a short length, and that is why I referred him to Mr. Welch, who was the representative of a competitor [689] who did make that type extrusion.

Q. Did you take Mr. Grindle through the plant at the time and show him what you could do?

A. To the best of my knowledge, no. The best of my memory, I would say no.

Q. Do you recall the incident of the visit very clearly?

A. I just recall it to the extent that I remember him coming down and asking for tubing and referring him to Mr. Welch. After this many years and the number of people I see, I couldn't very well testify under oath as to exactly what I did with him.

(Testimony of John G. Robb.)

The Court: Is that all?

Mr. Hohbach: That's all.

Mr. Naylor: No further questions. Thank you.

The Court: You may step down.

(Witness excused.)

Mr. Naylor: That concludes redirect of Mr. Welch.

Mr. Swain: May it please the Court, when Mr. Welch was on the stand, I read certain portions of his deposition to him and I had him identify one of the drawings attached to that deposition, and I would like to ask that that be marked Plaintiff's Exhibit next in order.

The Court: Can't you put the whole deposition in evidence, including the attached exhibits?

Mr. Swain: Then at this time I offer the deposition [690] which is Plaintiff's Exhibit 34 for identification as—a defendant's exhibit.

The Court: It will be received in evidence.

Mr. Naylor: Agreeable.

The Clerk: Plaintiff's Exhibit No. 34 in evidence.

(Whereupon deposition previously marked Plaintiff's Exhibit No. 34 for identification was received in evidence.)

Mr. Naylor: What number was that?

The Clerk: 34.

Mr. Naylor: 34.

Mr. Swain: Mr. Welch, if you please?

C. MARTIN WELCH

the defendant herein, recalled to the stand; previously sworn.

Recross-Examination

By Mr. Swain:

Q. Mr. Welch, I believe you have testified that in the assembly of dipsticks after the filler with the calibrations and the two tubes were inserted in the outside tube—mind you, I am speaking about the actual construction as to which you testified—some cement is put in and a wafer is put in, more cement, another wafer, more cement and a wafer, and so on until the end plug is built up, is that right?

A. That is the practice I have mentioned. [691]

Q. And then pressure is applied?

A. Extensive pressure is applied, yes.

Q. Let's assume much the same series of circumstances, in which you had a wooden filler with the calibration, the two tubes properly positioned and the outer tube there. If you put a body of cement in and then put one large plug in on top and applied pressure, wouldn't the adhesive come up the sides and seal between the side edges of the large plug and the interior walls of the square extrusion?

A. No, I am quite sure you would find it taking the path of least resistance, going right down the side, covering your paper and your wood. As a matter of fact, that is one of our problems, Mr. Swain.

Q. Well then, in the assembly which you describe and which you follow, when you put cement in and

(Testimony of C. Martin Welch.)

put the first wafer in, does your cement run down the sides?

A. When we get too much of it, it does, yes. That is one of our problems; have to put a very small dab of it on, just enough to hold the plug in there, is all.

Q. Then it is your testimony that a large plug would not work for that reason?

A. It wouldn't work under that method, because it would shoot the cement down. It wouldn't force it up the sides.

Mr. Swain: I see. I think that's all.

Mr. Naylor: No further questions, Mr. [692] Welch.

(Witness excused.)

Mr. Naylor: If the Court please, in winding up the defendant's case, there were two ways in which we could do what I am just about to do. I have here two prior art patents. I could interrogate Mr. Grindle about them, or Mr. Welch, or call an expert. But that's a time-consuming process, and it occurred to me that it would be far preferable than to have these patents come in by way of interrogation, to offer the printed copies of the two patents for the same purpose that we offered the various dipsticks, to indicate to Your Honor the background environment, the backdrop, if you will, against which Mr. Grindle's work was done as reflected by his April 28th drawing.

And if that is agreeable to Your Honor and it is agreeable to Mr. Swain—I assume it will be agree-

ple to Mr. Swain—I would like to offer these two printed copies, and for sake of continuity on the record, merely direct Your Honor's attention to the parts of them which we think are pertinent and material to illustrate the prior art, the condition of the prior art, and supplement the various dipsticks in that way.

The Court: That's certainly satisfactory to me if it is to you, Mr. Swain.

Mr. Swain: Well, Your Honor, I have not seen these patents and I frankly am a little bit taken by surprise. I [693] don't see the competency or the relevancy of the materiality of these patents. Of course I can hardly speak at length on the subject, not having seen them. But the patent, it seems to me, in suit here, Mr. Welch's patent, speaks for itself, and the only thing that I see that these prior art patents can do is serve to invalidate the patent here, and I do not see how Mr. Welch, claiming to be the inventor, can in any way derogate from the scope of the claims and the scope of the application which he filed.

The Court: I don't think that is the purpose.

Mr. Naylor: That isn't the purpose.

Mr. Swain: Then I missed it.

The Court: If you want an opportunity to examine them, of course you may have it; but in view of the fact that they may or may not be helpful to the Court, I am inclined to receive them and if they are not helpful, why then, of course I will disregard them in my consideration of the entire matter.

Mr. Swain: I appreciate that, and then I am cor-

rect, Mr. Naylor, that you are not introducing these for the purpose of invalidating this patent?

Mr. Naylor: I am not, most certainly. I am introducing them to augment the prior art as it has been identified here.

The Court: That's what I understood to be the purpose.

Mr. Swain: Well then, that's all right, that's satisfactory. [694]

The Court: Let them be received in evidence.

Mr. Naylor: I appreciate that Mr. Swain was not aware that we would put them necessarily to this use, but I would call attention to the fact that in a conference with Mr. Flehr and Mr. Hohbach these patents were called to their attention.

Mr. Swain: I am not objecting to that.

The Court: Well, I don't think there is any use in laboring the point, since Mr. Swain now understands the purpose of the offer.

Mr. Naylor: Yes. I have here an official copy made by the Patent Office for your Honor.

The Court: It will be received in evidence.

The Clerk: It will be Defendant's Exhibit U-1 in evidence.

Mr. Swain: Is there only one?

Mr. Naylor: Only one at a time. The first patent of your Honor, was a patent to D. C. Hyde, No. 3868 of May 26, 1863.

(Whereupon, copy of patent referred to above was received in evidence and marked Defendant's Exhibit U-1.)

The Court: A long time ago, isn't it?

Mr. Naylor: Yes, sir.

The Clerk: The second patent?

Mr. Naylor: And we offer that as defendant's ext. I [695] think it has been so received.

The Clerk: No, but it will be defendant's Exhibit V-1 in evidence.

(Whereupon, copy of patent referred to below was received in evidence and marked Defendant's Exhibit V-1.)

Mr. Naylor: V-1, the second patent in this pair, the patent of E. Schmitt, No. 1423156, dated July 3, 1922.

To point out the significance of the Hyde patent, we would direct your Honor's attention to certain characteristics of the device as illustrated and described in the specification, and on page 1, column 1, lines 50 et seq., of that column, which are the last four lines, statement is made, "In manufacturing my improved wontage engaging rods, for ordinary purposes, I inclose the entire length of the indicating tube (A) within the center of a square fitted rod (B), figure 1."

Continuing at the top of column 2, "Made of wood, metal, gutta percha, or any other suitable material, so that either end of the rod shall be flush with the ends of the inclosed tube." And then goes on to describe the characteristics of the slots that are cut, or rather slits that are cut longitudinally of the stick, to expose the glass tube, and reference is also made in the specification to the calibrations on the several sides or faces of the stick, [696] and particular attention is invited to the fact that

in column 2, of page 1, in the middle of the page commencing at line 26, by personal count, the statement begins:

“The indicating tube (A) in my improved gauge or gauging rod may be closed hermetically at pleasure by the simple pressure of the finger upon its upper end, which is finished off evenly for the purpose, as illustrated in figures 1 and 3 of the accompanying drawings.”

And then it goes on to speak of a spring loaded valve on the top of the device as an alternative way of closing off the tube.

On page 2 of that patent, column 1, lines 13 seq.:

“The tube may be protected and combined with the necessary scales and the rod manufactured in many different forms or styles. In fact, my improved gauging rod may be made wholly of glass or other transparent material with graduated scales marked directly thereon.”

And as I said, that patent is offered to illustrate the prior art.

The second patent, the patent to Schmitt, N. 1423156, Exhibit V-1, is offered to show the idea of an enclosed tube serving a plurality of scales. Here attention is invited to the fact that in figure 1 there is shown a central tube with [697] a fluid column to be captured in it in the manner illustrated in figure 2, wherein the dipstick is inserted in the tank denoted by the numeral 52, and the operator's thumb is placed upon the top opening of the central tube to raise from the tank the column of fluid to a

read against the selected scale," and attention is focused on the fact here that one chart or calibration serves the Stutz automobile, so designated, and still another surface serves Ford and Buick. And hence the patent is illustrative of the art and adds to the art that we had tendered.

That concludes the defendant's case, your Honor.

Mr. Hohbach: Your Honor, I would like to ask a few questions of Mr. Grindle on rebuttal.

The Court: Take the stand.

EUGENE L. GRINDLE

the plaintiff herein, recalled on behalf of the plaintiff, in rebuttal; previously sworn.

Direct Examination

By Mr. Hohbach:

Q. Do you remember Mr. Kerr's testimony in connection with Plaintiff's Exhibit 5?

A. Yes, I do.

Q. Plaintiff's Exhibit 5 refers to this sample which was [698] built up, is that correct?

A. (Nodding in the affirmative.)

Q. Can you definitely recall the construction of the sample dipstick which was submitted to the Plastic Process Company?

A. Very definitely.

Q. Were the ends sealed?

A. Yes, they were.

Q. Did it contain a scale?

A. Yes, it did.

Q. What type?

A. It was a piece of $\frac{3}{8}$ ths inch square wood upon

(Testimony of Eugene L. Grindle.)

which I personally cemented a paper scale with DC-4 airplane calibrations on it.

Q. How were the fluid columns formed?

A. Fluid columns were formed by laminating pieces of 3/16ths inch plexiglass together, leaving voids in the center of each one.

Q. Could they have been machined?

A. They could not have.

Q. Why not?

A. Well, I don't see that they—I shouldn't say they couldn't have been; I mean, physically they could have been, but in this case they were not, because it is an extremely difficult—when you talk about difficult work—it would be extremely difficult to machine a groove in plexiglass. It [699] is extremely brittle. To do it would take very special equipment.

Q. Did Pan American have this equipment at this time? A. It did not.

Q. What kind of equipment would it take?

A. Well, it would have required a milling machine type of machine with special grinding tools to get a groove in plexiglass without cracking it.

Q. Mr. Kerr—do you remember Mr. Kerr mentioning seeing some markings in the fluid columns which made him think it was made by a machine?

A. I recall him mentioning that, that they were caused by a machine—they were tool marks.

Q. What might have caused this?

A. It is very possible if such marks existed—and they couldn't have been too obvious or I would have recalled it myself—but in laminating these

(Testimony of Eugene L. Grindle.)

pieces of lucite together, as each layer was put on there, I know that Mr. Montoya then dipped a brush in solvent and coated these surfaces again with solvent just to assure a good seal. And brush marks—because as soon as you touch this solvent to the plastic, it softens, and brush marks could have possibly appeared in the plastic.

Q. They could have appeared as cuts made by a tool, is that correct? [700]

A. They would look to me like tool marks.

Q. But they might have to somebody not familiar?

A. They would look like streaks or something in the plastic.

Q. Were the ends sealed in this dipstick you sent to—

A. Yes, they were.

Q. What was the purpose of the sealing of the ends?

A. There were two purposes. The primary purpose, always, of sealing the ends of the dipsticks or putting plugs in the ends of the dipstick was to accurately position the calibration within the tube. The whole design of this dipstick was to be accurate, and for it to be accurate, the calibrations inside had to be held in extremely close proximity to the end of the stick. Secondly, because it enclosed a piece of wood with a paper cemented to it, the other purpose of the plugs was to seal the ends so that you wouldn't saturate the paper.

Q. Do you remember Mr. Kerr's testimony in connection with the feasibility of making an extrusion?

A. Yes, I do.

(Testimony of Eugene L. Grindle.)

Q. What was your intent in submitting your drawing, which is Plaintiff's Exhibit 6, to an extrusion manufacturer?

A. It was for the purpose of determining if this section could be extruded, and a price quotation, so that we could determine whether it would be practical to order such an extrusion—and in dealing with outside vendors, who [701] specialize in particular fields, we always solicited their comments or suggestions as would pertain to their particular manufacturing methods.

Q. What did Mr. Kerr say about this extrusion?

A. Mr. Kerr's testimony, he said it would have been literally impossible to make. Or, he didn't say that, say "literally"; he said, I think, practically impossible, or something like that.

Q. The measurements of this extrusion as shown in Plaintiff's Exhibit 6 are critical, are they?

A. Not at all.

Q. Why do you say that?

A. Well, I had determined that as long as the fluid column tubes were 3/16ths of an inch in diameter or smaller, it would be usable, practical to use to support this column of gasoline. I therefore made the cross-section of the fluid columns in this extrusion considerably smaller than that, so the tolerances, plus or minus—a considerable tolerance—to a considerable tolerance—wouldn't have been any problem.

Q. Did you convey this information to Mr Welch on his first visit to you?

(Testimony of Eugene L. Grindle.)

A. I can recall Mr. Welch, when we discussed the drawing, the drawing called for a 64th of an inch tolerance, which I consider sort of an average tolerance for an item of this type, or for extrusions, and I have had many extrusions that I have [702] designed, built, and mostly in metals, however—Mr. Welch questioned the tolerance of a 64th of an inch and I told him if he could meet that there would be no problem, that tolerances weren't a problem.

Q. I show you Defendant's Exhibit F. Is there any notation on there which states whether or not the tolerances are critical?

A. Yes, there is. It says, "Any tolerance is O.K."

Q. I hand you Plaintiff's Exhibit 2, which apparently is a letter from Mr. Kerr to Mr. Welch. Can you tell me what he states in the first paragraph about the standard extrusion which—strike that—what he stated about the extrusion which you had asked for a quotation on?

A. Yes. It just says, "As we could hardly make a die for this section and keep the price within reasonable range, we decided to use the standard extrusions."

Q. Does he state in this letter that it would be impossible to make such an extrusion?

A. No such thing.

Q. What you mean to say is that he actually said that?

A. He only said that tooling would be expensive

(Testimony of Eugene L. Grindle.)

to make the extrusion, then, not that the extrusion would be impossible to make.

Q. Because of limited quantity you were interested in? A. That's correct. [703]

Q. Do you recall Mr. Kerr's testimony on the sample he had made up and sent to Mr. Welch?

A. Yes, I do.

Q. Do you know why Mr. Kerr suggested the use of only two fluid columns instead of four, as suggested in your extrusion?

A. It would be a natural suggestion, using the particular extrusion that he recommended, putting a round tube in opposite corners of the square tube. If he had put round tubes in all four corners, there wouldn't have been enough flat surface left inside to place a calibration on it.

Q. Did you ever receive the quotation which was made by Plastic Process Company, dated May 11th 1948, and sent to Mr. Welch?

A. No, I did not.

Q. Do you recall Mr. Welch's testimony on what he had submitted to you after you had asked for a quotation on the standard extrusion?

A. Do I recall Mr. Welch's testimony?

Q. Yes, on what he had submitted to you after you asked for a quotation on this standard extrusion, which is shown in Plaintiff's Exhibit 6.

A. I remember what he submitted to me, yes.

Q. What did he submit to you?

A. He submitted these standard extrusions from Plastic [704] Process Company, these square extrusions, and the two pieces of round extrusion.

Testimony of Eugene L. Grindle.)

Q. Were they held together in any manner?

A. They were not.

Q. Did you hear what Mr. Kerr has said he had sent to Mr. Welch?

A. Yes, I recall him saying he sent them with a wooden filler.

Q. Could Mr. Welch have removed this wooden filler before he brought the standard extrusions out?

A. Certainly could have. It had been slid in there; it could just as well have been slid out.

Q. After you received the standard extrusions from Mr. Welch, what did you do?

A. Well, as I testified earlier, I took them to the drafting supervisor, Mr. A. Chong, and gave him instructions and sketches of how I wanted the drawing made to cover the complete dipstick.

Q. You stated under direct examination that you had given an advance copy of the drawing to Mr. Welch, is that correct? A. I did.

Q. I hand you a copy of Defendant's Exhibit P. In what date was this drawing released?

A. This drawing was officially released on or after June 7th, 1948.

Q. How do you fix that?

A. That's the date that the approval signatures were placed [705] on the drawing.

Q. This advance copy you are speaking of, what was it given out before this drawing was released?

A. Yes, it was.

Q. Did that advance copy have end plugs in it?

A. It had thin end plugs, yes.

(Testimony of Eugene L. Grindle.)

Q. Is there any way of establishing that at this time?

A. It would be very difficult, because the ends have been drawn over again, and I wouldn't try to say definitely that I could interpret that from this drawing at this time, but I recall very definitely that they called for end plates.

Q. What caused you to change the end plugs?

A. Well, as I and Mr. Schmitt have previously testified here, in testing this stick to destruction—

Q. What stick?

A. The sample Mr. Welch submitted. We determined that the ends were weak, that the end plate broke out and split the end of the tube, and that wouldn't, therefore, hold up as with a proper seal, that the thicker end plugs would be required to give additional bonding strength for the purpose of resisting the impact loads of the wooden filler if they were thrown against the ends.

Q. Do you know why the price, 25-cent price increase, was made in the first purchase order given Mr. Welch?

A. Yes. They were for the purpose of covering what I consider [706] would be additional expense in increasing the size of those plugs from thin, I believe it was 1/16th inch plate, to a much thicker plug.

Q. This Defendant's Exhibit P; would you say that this was a copy of the drawing that was first officially released? A. That is.

Q. Why do you say it is the first copy?

Testimony of Eugene L. Grindle.)

A. Because it shows no change in the change block.

Q. Does Exhibit P call for the use of AN-C 141 cement? A. Yes, it does.

Q. Where does it call for it?

A. It calls for it down here where the -12 block is called out and says, "Cut out the block similar to 6 filler and cement to the -8 (which is the square tubing) with AN-C 141 cement all around."

Q. How thick is that block?

A. The block was 11/32nds of an inch thick.

Q. Would AN-C 141 form a suitable bond between the block and the outside extrusion?

A. I am satisfied that it would.

Q. Do you know what AN-C 141 is composed of?

A. I can't tell you exactly, but I can tell you the type of cement that it is.

Q. Will you tell us?

A. Yes. AN-C 141 is a catalyst type cement, consisting [707] primarily of acrylate monomer resin, which is mixed with a suitable catalyst, and it is thinned by ethylene dichloride. A catalyst type cement is a cement that cures by chemical reaction rather than by the evaporation of solvents, and this type of cement, it will fill a cavity without shrinking in the curing process. That is the primary purpose or feature of a catalyst type cement. The curing is by a chemical reaction rather than by evaporation of solvents.

Q. Is this AN-C 141 specification still available?

A. It has been superseded twice since that time,

(Testimony of Eugene L. Grindle.)

but the basic type of material is still the same.

Q. Have you tried to locate a copy of this specification?

A. Yes, I have, after it was suggested in this trial. I contacted the Government Printing Office, found that it was out of print and that there wouldn't be any copies in Washington, but they suggested I might possibly find one at some air force station. I then called the Air Force Technical Library in Oakland, requested that this same information—requested the information from them. They said they no longer carried them in their files, that they had been superseded, and they threw all the old ones away.

Q. I show you Plaintiff's Exhibit 26. You heard Mr. Chong testify about transferring to this drawing by means of red pencil what he could see on the vellum?

A. Yes. [708]

Q. What did he transfer?

A. Oh, he transferred only those things that he could be positive or sure of without misinterpretation of the drawing. We did not represent in this courtroom that he had transferred everything that had previously been on this drawing, only that he transferred what he could be sure of.

Q. So something was written over something that was erased—why, he didn't transfer it because he couldn't make it out, is that correct?

A. That's right. And also, it could have just been a drafting error and an erasure. It wasn't necessarily on any released print of the drawing.

(Testimony of Eugene L. Grindle.)

Q. Do you recall the testimony by Mr. Welch concerning how tightly the wood filler was to fit into the wooden extrusion? A. I sure do.

Q. Into the plastic extrusion? I am sorry. Is it necessary that the filler fit tightly within the square extrusion?

A. On the contrary, it's definitely not to fit tight.

Q. Why do you say that?

A. Well, it is quite obvious that if you are going to increase the exterior dimensions of that wooden filler by cementing paper around it, it would no longer fit in the tube, and it should fit in the tube loosely even with the paper around it, so that there isn't any tension placed in the exterior case. [709]

Q. Do you know whether the fillers that are put into Mr. Welch's dipsticks fit tightly into these square extrusions?

A. They fit extremely loosely, much looser than were even called for in my drawing, which gave about, oh, 20 to 30/1000ths clearance in there. He has more than doubled or tripled the amount of clearance that I called for, and they fit extremely loose in the——

Q. Have you examined some of his dipsticks?

A. Yes, I have.

Q. Is this a dipstick which you cut up yourself?

A. Yes.

Q. Is it one of the dipsticks made by Mr. Welch?

A. Yes, it is one of his production B-377 dipsticks.

Q. How do you ascertain that?

A. Up here in the colored ends of the corner

(Testimony of Eugene L. Grindle.)

it shows it as a dipstick for a B-377 airplane, manufactured by C. Martin Welch & Company.

Q. What are these other pieces?

A. Well, these are pieces that were cut out of this particular dipstick.

Q. Will you demonstrate the portion in which the scale has been removed?

A. Yes. I would like to show the court, your Honor, if you would look at that, just how loosely the wooden filler fits in the tubing. If you look in the end, you can see there is [710] well over a 16th of an inch clearance all around the wood.

Q. This was cut out from between these two pieces I am holding here in my hand?

A. Yes, it was. It was just to get a piece of the wood out. We could also take a piece that Mr. Welch has placed in Exhibit—in this exhibit here which was represented as the type of wood he has always used in the dipsticks, and you will see it will fit in exactly the same clearances.

Q. If the wood filler fitted very tightly in the square extrusion, would it be possible to place the paper scale in it?

A. It would be practically impossible unless you had some way of expanding the case and then letting it retract it again after it was in there, which I think would be extremely difficult.

Mr. Hohbach: I would like to offer these in evidence as plaintiff's next in order.

The Court: It will be received.

Mr. Hohbach: And maybe we can mark it at three parts.

(Testimony of Eugene L. Grindle.)

The Clerk: Exhibits 36-A, B and C.

Mr. Hohbach: Mark the A as the longest part and B the section in which the paper scale is removed and C as the shortest part.

(Whereupon, three parts of dipstick above referred to were received in evidence and marked Plaintiff's Exhibits 36-A, B and C as indicated above.) [711]

Q. (By Mr. Hohbach): Have you been friendly with Mr. Welch in the past? A. Yes, I have.

Q. Do you recall Mr. Welch's testimony in connection with your visit to the Transportation Club on May 27th, 1953? A. Yes, I do.

Q. Can you tell us what occurred?

A. What actually occurred or what Mr. Welch said?

Q. Why did you visit Mr. Welch at that time, and did you visit Mr. Welch?

A. I can recall now visiting Mr. Welch on that particular day.

Q. Was that a social visit?

A. I don't consider it as such.

Q. Why did you visit Mr. Welch?

A. Well, it happens that on that particular day I was in the city on another patent matter, had an appointment with Mr. Flehr of your office, to discuss another patent matter, and after we had finished our business I left his office, which is right across the street from the Palace Hotel, in which the Transportation Club is located, and my car was

(Testimony of Eugene L. Grindle.)

parked in a garage, again across the street from the Palace Hotel in the building in which Mr. Welch's offices were located. Being that I hadn't been in the city for quite a few months, as I recall, and I hadn't seen Mr. Welch for some time, I just [712] thought I would stop up and say hello. I was still on a speaking relationship with Mr. Welch.

Q. When did you go in—pardon me. When did you go in and see Mr. Flehr?

A. I had an appointment with Mr. Flehr, I believe, about two-thirty, and I was there until five o'clock.

Q. Did you recently check that?

A. Yes, I have.

Q. I show you a document. Can you identify it?

A. Yes. We found this yesterday in Mr. Flehr's appointment book.

Q. Were you present when we examined the appointment book? A. Yes, I was.

Q. And what did you find?

A. I found that it shows that I was in Mr. Flehr's office between 2:45 and five o'clock.

Q. And on what day?

A. On May 27th, 1953.

Q. Does that appear on the sheet?

A. Yes, it does.

Q. Was anyone else in the office at that time?

A. Yes, another gentleman. I didn't know who he was at the time. He stopped into the office and Mr. Flehr asked if he could take a few minutes with him, and it wouldn't take very long. I stepped

(Testimony of Eugene L. Grindle.)

to another office and we resumed our [713] discussions after the gentleman left again.

Mr. Hobbach: I offer this in evidence as Plaintiff's next in order.

The Court: Let it be received.

The Clerk: Plaintiff's Exhibit 37 in evidence.

(Whereupon, extracts from Mr. Flehr's appointment book referred to above were received in evidence and marked Plaintiff's Exhibit No. 37.)

Q. (By Mr. Hobbach: After you had completed your call on Mr. Flehr, what did you do?

A. Well, after I left Mr. Flehr's office, I was going over to my car and I thought I would stop at Mr. Welch's office and say hello to him, which I did. And he met him hail fellow, well met, and took me over to the Transportation Club for a drink, and I went over with him. We had one or two drinks and then we left together and Mr. Welch came across the street and chatted with me for a few minutes while I waited for my car to be brought. Then I left and he walked down; he mentioned to me his car was parked a block or so away, so I walked down the way to get his car as I left, and on the way driving down Bayshore Mr. Welch passed me.

Q. Do you know whether Mr. Welch had any trouble with printing up the scales for the first 100 posticks?

A. Mr. Welch came to me and told me the trouble that he had had. [714]

(Testimony of Eugene L. Grindle.)

Q. What did he tell you?

A. He told me that he had had difficulty with the printing plate, that it was very expensive and he didn't see how he could tolerate such expense in regard to this order that he was filling for us.

Q. When did this take place?

A. It took place very shortly after our purchase order was placed with him for the first hundred dipsticks. I don't recall how—it was within a matter of a week or two—how soon it was after that.

Q. Did you do anything for Mr. Welch after that?

A. I told Mr. Welch that I had facilities at Pan American to print the charts for him, and I would take care of that and give them to him.

Q. And did you do that? A. I did that.

Q. What did you give him?

A. I gave him several hundred copies of a chart that was printed in our print shop on a Multilith machine, gave him several hundred copies.

Q. Was this a three-section scale?

A. Yes. We only had facilities at Pan American for printing a plate, oh, legal size plates, about fourteen inches long. So we could only get about thirteen inches of printing on it, and it would require three sections to get the complete dipsticks [71] length.

Q. Was Pan American ever paid for this?

A. They never were.

Q. You did it gratuitously?

A. I did. They did, I should say.

(Testimony of Eugene L. Grindle.)

Q. Did you have an opportunity to examine Mr. Welch's patent application file?

A. Briefly, yes.

Q. Did you notice a Pan American drawing in the file? A. Yes, I did.

Q. Can you identify the drawing?

A. Yes, this is the same one—if this is the same one I saw yesterday. Yes, I can—this is a drawing of the B-377 dipstick, complete dipstick.

Q. Were you still in the engineering department when this drawing was made?

A. I was at that time, yes.

Q. What time was that?

A. Well, as we indicated yesterday, the date on this drawing was a year off. It was actually February 4th of 1949, even though the date on the drawing says 1948. We stipulated that that was in error.

Q. Does this filler show the use of radius grooves? A. Yes, it does.

Q. I show you a copy of a drawing which is entitled "Liquid [716] Column Type Measuring Gauge." How are the grooves formed in that drawing? A. Well, they are square cut.

Q. Did you notice any other drawings in this patent application folder?

A. I don't believe so.

Q. Now, the only drawing which showed the round cut is your Pan American drawing?

A. Yes. As we have seen, the first release of that

(Testimony of Eugene L. Grindle.)

drawing showed square-cut corners, the second release of the drawing showed radiused corners.

Q. Which drawing are you speaking of now?

A. Plaintiff's Exhibit 8 is the later release of that DC-4 drawing, that showed radiused corners.

Q. Did Mr. Welch ever ask you about using dipsticks in filling stations? A. Yes, he did.

Q. In what connection?

A. Well, some time after we had received the initial delivery of dipsticks from Mr. Welch, which would be some time after August 12th, 1948.

Q. Do you recall any of the discussion?

A. Yes. Mr. Welch came into my office—I don't know what his purpose of coming was, specifically; but during the course of his conversation with me he said that he had stopped that [717] morning at his gas station and had shown one of his dipsticks to the attendant and the gas station attendants asked him if he could make that type of dipstick for his fuel tanks underground, and he said, "Gene, what do you think about it?" I said, "Why, that would be very easy, but you couldn't use it in the same manner. You would have to put a plug in the bottom."

Q. Why couldn't you use it in the same manner?

A. Well, because the tanks in the ground—I happened to have run a gas station many years ago. Tanks in the ground are quite deep. A dipstick for an underground tank is ten to twelve feet long. You couldn't hold your finger that far out and read it very well unless you were some kind of a freak

(Testimony of Eugene L. Grindle.)

Q. I show you Exhibit R-1. Does the valve-controlled model dipstick appear in that drawing?

A. It is mentioned in this drawing, yes. It doesn't show any details of what it calls the valve-controlled model.

Q. Did you hear Mr. Welch's testimony that he had had this drawing made up?

A. Yes, I did.

Q. Would this indicate to you that this drawing was made up after he had a discussion with you on a valve control?

A. It certainly would.

Q. Do you notice the end plugs that are shown in the drawing?

A. Yes, I do. [718]

Q. What kind of end plugs do you think are shown in the drawing?

A. Undoubtedly it is, I would say—or it shows, rather, end plugs to be made up of laminated sections.

Q. How did you arrive at that conclusion?

A. Well, because the particular view in which the end plugs are called out is what is known in drawing procedure as an orthographic projection, and in an orthographic projection anything shown on a flat plane would not be shaded. The purpose of shading is to show an object which is viewed from some angular plane, not a flat plane. And even if this dipstick were to be drawn in this manner in some other plane, the vertical lines on the thing would not be shading, because they are in the wrong direction. As you can see on this same view, the round tubing in here, which is obviously a round

(Testimony of Eugene L. Grindle.)

piece, cannot be shown in the flat plane. He has shown shading on it in the lateral direction on this drawing. But any vertical lines on there could not be shading; they would have to be indicating laminations or something like that, or striping of some kind on the stick.

Q. Did you hear Mr. Welch testify about using laminations for making up end plugs?

A. Yes, I did.

Q. Did you hear him testify about using as many as eight laminations to make up the end plug? [719]

A. Yes, I did.

Q. Could he possibly have shown that number of laminations?

A. Well, he is showing approximately eight there; it looks as though it might be eight, if you want me to count them.

Q. Would this indicate to you that he had had this drawing made up after he had made laminated ends?

A. That would be a reasonable assumption to me.

Q. Are you familiar with some of the dipsticks that were introduced in evidence by the defendant?

A. Yes, I am. Practically seen all of them.

Q. Do you recall Mr. Welch's testimony in connection with the use of metal in dipsticks?

A. Yes, I do.

Q. Can metal be used in dipsticks?

A. Certain types of metal can, yes.

Q. What types?

A. Well, primarily non-ferrous types, aluminum

estimony of Eugene L. Grindle.)

a-ferrous metal. There wouldn't be any danger of
urks from aluminum whatsoever, so aluminum
uld be very satisfactory in a dipstick.

Q. Does the Welch patent application—or strike
it.

Does the Welch patent specify any particular
tal for the nails that are used?

A. No, it doesn't—just calls out nails.

Q. Were any of the dipsticks which you designed
npensated [720] for column drop?

A. Yes, the first Boeing dipsticks that we or-
ced were compensated for column drop.

Q. Did you convey this information to Mr.
elch? A. I did.

Q. I hand you a chart. How did you convey that
ormation to Mr. Welch?

A. Mr. Welch had been questioned about column
op in this dipstick, and I recall him calling me
om Dayton, Ohio, on the telephone, asking me
out it. I said yes, there would be—could be a
umn drop compensation and there should be, if
i wanted to use the dipstick in some particular
nner. And in explaining it further to him, I
d that I would prepare column drop compensa-
n for him and give it to him.

Q. Is it your opinion that Mr. Welch—strike
it.

Did Mr. Welch have any knowledge about column
op before you conveyed this information to him?

A. Not to my knowledge. He called me on the
one from Dayton with some very fundamental

(Testimony of Eugene L. Grindle.)

questions regarding the dipstick. I was amazed some of the questions he was asking me about the thing.

Q. What dipsticks first incorporated the column drop?

A. The first one that Pan-American incorporated it in was the B-377. I don't know whether Mr. Welch put them in any other sticks before that or not. [721]

Q. What is shown on this chart?

A. This chart merely shows the amount that you would compensate the calibration or the amount that you would offset the calibration on the scale for each inch length of the scale.

Mr. Hohbach: I offer this as Plaintiff's next in order.

The Court: It will be received.

The Witness: I would like to say——

The Clerk: Plaintiff's Exhibit 38.

(Whereupon, column drop chart referred to above was received in evidence and marked Plaintiff's Exhibit No. 38.)

The Witness: Mr. Hohbach, if I may? I would like to say that this type of dipstick does not necessarily require column drop. We did not incorporate it in our first airplane, for a very specific reason. I had this column drop in a rough curve prior to the time that that curve was drawn, but there are two basic ways of using this type dipstick. One is to dip it in the tank with your finger over it, lift it

(Testimony of Eugene L. Grindle.)

t of the tank and read it with the lower end
ll submerged in the fuel, in which case you would
t get a column drop, a full column drop. On the
her hand, if you dip the stick in the fuel, place
ur finger over it, completely remove the stick
om the fuel, you will get the full column drop. Now,
ecause in an air line you try to lean toward the con-
ervative side, the conservative side in our long-
nge operations, to insure [722] that you will have
adequate amount of fuel aboard the airplane, if
u had a compensated stick, that is, compensated
r the column drop, and you put it in the tank and
u read it without completely removing it from the
el, you would get a reading that was too high.
erefore, because people weren't familiar with this
pe stick when we first started using it, we did
t incorporate the column drop compensation, be-
ause we didn't want anyone getting short-changed
fuel. Later on, because you couldn't always get
extremely accurate readings as you wanted with-
t the column drop, and because people had be-
ne familiar with the stick, we did incorporate
e column drop in there, and it made it that much
ore accurate.

Q. Are you still employed by Pan-American?

A. Yes, I am.

Q. Do you care to reveal your present salary?

A. If you so wish.

Q. What is your present salary?

A. \$612.00 a month.

Q. Do you have any other sources of income?

A. I have another source of income, but I don't

(Testimony of Eugene L. Grindle.)

have any other income at the moment. I mean, expect, when my corporation starts doing better that I will be drawing income from it.

Q. At the present time you don't have any other income, is [723] that correct?

A. My corporation to date has shown a loss.

Mr. Hohbach: That is all.

Cross-Examination

By Mr. Naylor:

Q. Mr. Grindle, you have directed your course of attention to this nail in the Welch patent?

A. Yes, I did.

Q. Now, you have read something that is there as to a characteristic of that nail, haven't you?

A. No, I haven't. I have only read that it does not specify that it would not be a ferrous metal.

Q. Oh, are you assuming that this must be written in the light of aeronautical regulations?

A. No, I am not, Mr. Naylor. I stated in reference to that, that if he ever put a nail in it, and I meant a ferrous nail, it could cause a spark—that no air line should use it, and Pan-American wouldn't use it.

Q. Now, have you ever heard of a non-ferrous nail? A. Non-ferrous nail?

Q. Yes.

A. We use aluminum nails ourselves, yes.

Q. Well, now, an aluminum nail on that structure would be perfectly satisfactory, would it not?

(Testimony of Eugene L. Grindle.)

A. Yes, it would, as far as the spark is concerned.

Q. And wouldn't you think a person of ordinary intelligence [724] who was once acquainted with aeronautical regulations would select an aluminum nail?

A. A person with ordinary intelligence?

Q. Yes.

A. That's a hard thing to describe, Mr. Naylor.

Q. Well, let us go a little further, then.

A. I mentioned there was another objection to putting a nail in the end, and that is because the difference of the coefficient of expansion and the surrounding plastic and the wood, you would undoubtedly end up with a leak very shortly.

Q. I would like to show you Defendant's Exhibit S-1.

A. This is very close to my heart, Mr. Naylor.

Q. It is? A. Yes.

Q. What is it?

A. It is a dipstick that was made by Lockheed Aircraft Corporation at the time when I was employed by them.

Q. I see. Now, what kind of metal is in the end of that structure?

A. Well, I happen to know that the end that is in this structure is brass, chromium plated, and when the dipstick was furnished by Lockheed it was protected with a rubber cap.

Q. It was?

A. Yes, it was. That dipstick, by the way, that

(Testimony of Eugene L. Grindle.)

you are just putting down there, Mr. Naylor, I believe was designed by [725] the Boeing Aircraft Company. We used them at Pan-American long before I went to Pan-American. They were used on our Boeing B-14 flying boats, which we ordered way back in the 1930s some time, and that particular dipstick was discarded as being impractical because it was an extremely costly job to maintain a seal in that valve.

Q. Yes. It does, however, show a valve, does it not? A. Yes, it does.

Q. And so when you were discussing with Mr. Hohbach a moment ago this matter of Mr. Welch talking to you about putting a valve in a dipstick, you didn't want the court to believe you were the inventor of a valve in a dipstick, did you?

A. Oh, absolutely not. I was very familiar with this dipstick.

Q. Now——

A. But in a gas station, Mr. Naylor, they could tolerate a little maintenance if it wasn't going to be used too often. Also, I suggested the use of a slider type valve, which has a rubber or neophrene type seal on it. It would have been a much better seal than this. This is merely metal against plastic.

Q. Thank you. Now, I would ask you again to age date this. You say you are familiar with this as far back as when?

A. That particular type there, if that is the Constellation type stick, somebody else might have made one similar to it, [726] but in 1946 when the

(Testimony of Eugene L. Grindle.)

Lockheed 649's were first delivered to TWA, they had that type of dipstick.

Q. As far back as 1946? A. 1946.

Q. Thank you, sir.

Mr. Naylor: May I have Plaintiff's Exhibits 28, 29, and 30?

Q. (By Mr. Naylor): Mr. Grindle, did we understand you to say that AN-C 141 is a cement for concrete?

A. I have said that it was satisfactory. I have never actually used it in a dipstick myself.

Q. Now, originally on the vellum of the June 7th, 1948, drawing—

A. June 7th is the official date of that.

Q. All right, I will accept that date. On the June 7th drawing, one impression of which is here exhibited by Defendant's Exhibit P, you specify AN-C 141? A. That's correct.

Q. As a cement, did you not?

A. That's correct.

Q. And then eventually that drawing was amended to substitute acetate butyrate cement?

A. That's correct.

Q. Why?

A. Because that's the way Mr. Welch made the dipsticks, [727] and I changed the drawings so that they could be accepted. It was primarily as a favor to Mr. Welch.

Q. But you are not representing, are you, that AN-C 141 is a cement for cellulose acetate butyrate?

A. Mr. Naylor, I was familiar with AN-C 141

(Testimony of Eugene L. Grindle.)

since 1948. It was used in our shops then for cementing purposes and for filling purposes. It is used in our shops today under a different specification number, but it is the same basic material. And I was familiar with it, I had the specification, and I had materials on hand at Pan-American.

Q. Now I would like to ask you a couple of questions further about that. Lucite and flexi-glass are the acrilate base plastics, aren't they?

A. Yes, they are.

Q. And they are the ones which have been identified as being made by DuPont and Rhom & Haas?

A. Yes, they are both methyl methacriolate.

Q. Yes. Now, AN-C 141 on Plaintiff's Exhibit 30 is recommended for lucite and flexi-glass, isn't that a fact?

A. Yes, the specification that you are holding there is for the purpose of cementing flexi-glass or lucite.

Q. And that's shown on Plaintiff's Exhibit 28, is it not?

A. No, Plaintiff's Exhibit 28 is the Douglas Aircraft process standard.

Q. Beg your pardon. I meant to say 30. [728]

A. This copy I have isn't marked. Pardon me. It is 29.

Q. Is it 29?

A. And 30 is an amendment to that. All right.

Q. All right, 28 and 29—or 29 and 30, rather?

A. 29 and 30.

Q. Now, actually AN-C 141 was not recom

(Testimony of Eugene L. Grindle.)

ended in any of this literature that you have proceeded here in court for butyl acetate, was it, or nitrite?

A. It is primarily recommended here in this process specification for cementing of acrylate base elastics.

Q. Yes. And there's no reference there to the butyl acetate or nitrite material, is there?

A. No, there isn't.

Q. Thank you. Now, under examination by Mr. Schbach, you referred to Defendant's Exhibit P, which was a print of the June 7th, 1948, drawing?

A. Yes.

Q. Did I understand you to say that there was still an earlier version of that drawing?

A. Earlier version of this drawing?

Q. Yes. A. Yes, there was.

Q. And is such fact indicated anywhere on defendant's Exhibit P?

A. No, there is not, but in my previous testimony I state [729] that I gave Mr. Welch a copy, an advance copy of a drawing—of this drawing.

Q. Of Defendant's Exhibit P?

A. Yes; before it was finished.

Q. In advance of what?

A. In advance of the June 7th date.

Q. Well, now, would it also be in advance of the 4th? A. Not very probably, but possibly.

Q. Well, which would it be?

A. The drawing would have to be in some stage of completion for it to have been of any use to

(Testimony of Eugene L. Grindle.)

anyone, so I assume it would most probably be June 4th or thereafter.

Q. So the most advanced it could be was between June 7th and June 4th, is that correct?

A. Correct—three days.

Q. Three days. Now, the fact that there was an earlier depiction on this vellum or the vellum from which Defendant's Exhibit P was struck, is there any evidence on this particular print in any way?

A. It isn't, and it would not have been, because it was not an official release. It was an advanced copy to accommodate Mr. Welch.

Q. You do not note those changes prior to official release? A. No, sir.

Q. Now, you mentioned supplying Mr. Welch with certain charts [730] that were printed by the process of Pan-American? A. That's correct.

Q. Could you fix the time for this?

A. Not any closer than I already have. Some time after our order was placed with Mr. Welch.

Q. Do you know whether it was after the dipsticks were delivered to you?

A. I feel quite sure in my mind it was before that he had not delivered a dipstick prior to the time or I wouldn't have seen any need to give him charts.

Q. Do you know whether that was some assistance that you supplied him on a subsequent order of Pan-American?

A. The only subsequent order that I recall, Mr. Naylor, was for a Boeing dipstick, and would have been an entirely different chart.

(testimony of Eugene L. Grindle.)

Q. Well, actually there were two orders, were there not? There was an initial order of a hundred and then a second order for a hundred?

A. Mr. Naylor, after the initial order is placed with Pan-American, I have no further connection with it. It then becomes a standard item and engineering is completely out of the picture.

Q. Well, you know from the testimony and exhibits here that there were two orders, don't you?

A. I don't know that, no. If it has been testified here, I [731] cannot confirm it, because I don't know.

Mr. Naylor: Excuse me, your Honor.

[I think that's all, your Honor.]

Mr. Hohbach: I have just one question, your Honor.

Redirect Examination

Mr. Hohbach:

Q. Would you be able to bond together two pieces of tenite with AN-C 141 cement?

A. I feel that I would be able to, Mr. Hohbach, because I have successfully bonded tenite together with ethylene dichloride, which is a solvent used with AN-C 141 cement, and the fact that our shops have done it. But I have not done it in our shops myself, on other items. I would like to say, Mr. Naylor, in winding up, that as far as the AN-C 141 cement is concerned, I called that out on the drawing; as I had had some experience with it and I thought it would be satisfactory for the job. The

(Testimony of Eugene L. Grindle.)

dipsticks were to be assembled in our shops, and there had been any difficulty in using it in our shops, I would have been the first one to have heard about it and I would have found an alternative solution to it. If Mr. Welch had come to me and asked me what AN-C 141 was, I would have told him. I would have given him the specification. I would also have given him materials, because I was interested in seeing a successful dipstick made.

Q. Mr. Welch never asked you about——

A. He never did. [732]

Mr. Hobbach: That's all.

Recross-Examination

By Mr. Naylor:

Q. You say your salary is six hundred odd dollars a month? A. \$612.00

Q. And you have no other income?

A. That's correct.

Q. What about the two devices that you and your company have been manufacturing?

A. My corporation is showing a loss, Mr. Naylor, and I have been producing that device for some time. I have immediate prospects of possibility making some income from that.

Q. Are you receiving any assistance at all financially in the conduct of this case?

A. None whatsoever.

Q. What about this financial group you said you had down the peninsula?

A. What would you like to know about them?

(Testimony of Eugene L. Grindle.)

Q. Well, are they offering you any assistance?

A. They are not.

Q. Are they exercising any control over you in this litigation?

A. They are not.

Q. They have no part in this litigation?

A. I am the president of the corporation and they are major stockholders. That is the only connection they have. [733]

Mr. Naylor: I think that's all.

The Court: Both sides rest?

(Witness excused.)

Mr. Naylor: I have one exhibit I would like to recall Mr. Welch for. It is one of those that have been touched on here just a moment ago and it's merely to conclude that phase of the case, if I may have leave to call him. I will explain what it is: It's an exhibit that I eliminated in attempting to shorten up the examination of Mr. Welch. It is the Independent Pressroom statement of August 31, 1948, for engraving, printing and assembling the aviation gasoline measuring rods.

The Court: What is it, a bill?

Mr. Naylor: It is a bill for it.

The Court: May it go in by stipulation without the necessity of calling the witness? If you want to call him, it is all right with me.

Mr. Swain: I will stipulate that it is genuine, and what else do you want?

Mr. Naylor: That's all—just that that is the statement that was received.

The Court: It may be received in evidence.

Mr. Naylor: Thank you.

The Clerk: Defendant's Exhibit W-1 in evidence.

(Whereupon invoice referred to above was received in evidence and marked Defendant's Exhibit W-1.) [734]

Mr. Naylor: Excuse me, your Honor.

The Court: Now, with regard to the motion to file an amended and supplemental complaint, I think it falls perfectly within the purview of Rule 15 (B) of the Rules of Civil Procedure, and I am going to admit it. But with regard to the two motions you made, Mr. Naylor, I will dispose of them at the time I write the memorandum.

* * *

[Endorsed]: Filed April 17, 1956. [735]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the defendant-appellant:

Excerpt from Docket Entries.
Complaint.

Answer of Defendant.

Amended and Supplemental Complaint.

Motion of Defendant to Reopen Case and for
Order Revoking Disclaimer.

Affidavit of C. Martin Welch in Support of Mo-
tion to Reopen Case.

Affidavit of Francis J. Burke in Support to Mo-
tion to Reopen Case.

Affidavits of Paul S. Stensen, John E. Davidson
and Eugene L. Grindle in Opposition to Motion to
Reopen Case.

Order Denying Motion to Reopen Case, etc.

Memorandum Order to Court on Validity of
of Patent, etc.

Findings of Fact and Conclusions of Law.

Judgment and Decree.

Notice of Appeal by Defendant.

Appeal Bond.

Notice of Appeal by Plaintiff.

Appeal Bond.

Order Extending Time to Docket Record on Ap-
peal to April 30, 1957.

Order Extending Time to Docket Record on Ap-
peal to April 30, 1957.

Order Extending Time to Docket Record on Ap-
peal to May 3, 1957.

Stipulation and Order Dismissing Appeal by
Plaintiff.

Defendant's Designation of Record on Appeal.

Reporter's Transcript of Proceedings.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7a, 7b, 7c,

8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31a, 31b, 31c, 32, 33, 34, 35, 36a, 36b, 36c, 37 and 38.

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, A1, B1, C1, D1, E1, F1, G1, H1, I1, J1, K1, L1, M1, N1, O1, P1, Q1, R1, S1, T1, U1, V1 and W1. [736]

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 2nd day of May, 1957.

C. W. CALBREATH,
Clerk;

By /s/ MARGARET BLAIR,
Deputy Clerk.

[Endorsed]: No. 15540. United States Court of Appeals for the Ninth Circuit. C. Martin Welch Doing Business as C. Martin Welch Co., Appellant vs. Eugene L. Grindle, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California Southern Division.

Filed May 2, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
Case No. 15540

MARTIN WELCH,

Appellant.

vs.

EUGENE L. GRINDLE,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant Welch sets forth the following Statement of Points on which he intends to rely in connection with his appeal herein:

1. The District Court erred in finding that there existed between the parties a justiciable controversy for declaratory judgment within the meaning of 28 USC 2201.

2. The District Court erred in failing to find and conclude that Appellee Grindle's cause of action was a stale claim, barred by the applicable California statute of Limitations.

3. The District Court erred in failing to find and conclude that Appellee Grindle, by virtue of a release or license, was estopped to maintain the asserted cause of action.

4. The District Court erred in denying Appellant Welch's Motion to Dismiss the asserted cause of action for declaratory judgment and in assuming

jurisdiction over the non-federal [739] question relating to the assignment of the patent and damages.

5. The District Court erred in adjudging Letters Patent 2,534,644 void because the application was not filed by the true inventor.

6. The District Court erred in adjudging Letters Patent 2,534,644 void because the dipstick disclosed in the patent was in public use for more than one year before the application was filed.

7. The District Court erred in denying Appellant's motion to reopen the case for the introduction of further evidence bearing on the asserted defense of prior public use of the invention forming the subject matter of Letters Patent 2,534,644.

8. The District Court erred in adjudging Letters Patent 2,534,644 void because the dipstick disclosed in the patent was published in drawing D-32,061, more than one year before the patent application was filed.

9. The District Court erred in adjudging that each of the three claims of patent No. 2,534,644 is invalid because it fails to define invention over the prior art, particularly Hyde and Schmidt.

10. The District Court erred in failing to adjudge Appellee Grindle guilty of laches and to dismiss the action for that reason.

11. The District Court erred in failing to find that Appellee Grindle had acquiesced in Appellant's

Welch's manufacture and sale of the subject devices in a manner and to an extent that barred the maintenance of the action and to dismiss the suit for that reason.

2. The District Court erred in failing to treat the suit as one based upon a stale claim the prosecution of which gave rise to circumstances meriting an award of reasonable attorneys' fees and in failing to make such an award. [740]

3. The District Court erred in ordering Appellant Welch to discontinue the marking of the subject devices with Pat. No. 2,534,644 and to notify customers and prospective customers that the subject devices were not patented.

Dated: May 7, 1957.

NAYLOR & NEAL,
JAS. M. NAYLOR,
FRANK A. NEAL,

By /s/ JAS. M. NAYLOR,
Attorneys for Appellant
Welch.

Service of Copy Acknowledged.

Endorsed]: Filed May 10, 1957.

No. 15540

United States
Court of Appeals
for the Ninth Circuit

C. MARTIN WELCH,

Appellant.

vs.

EUGENE L. GRINDLE,

Appellee.

Transcript of Record
(In Three Volumes)

Volume III
Book of Exhibits
(Pages 717 to 727)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

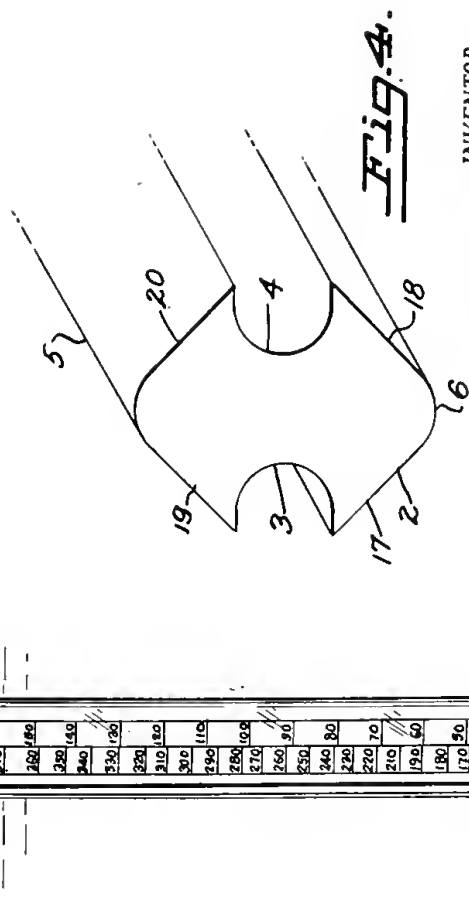
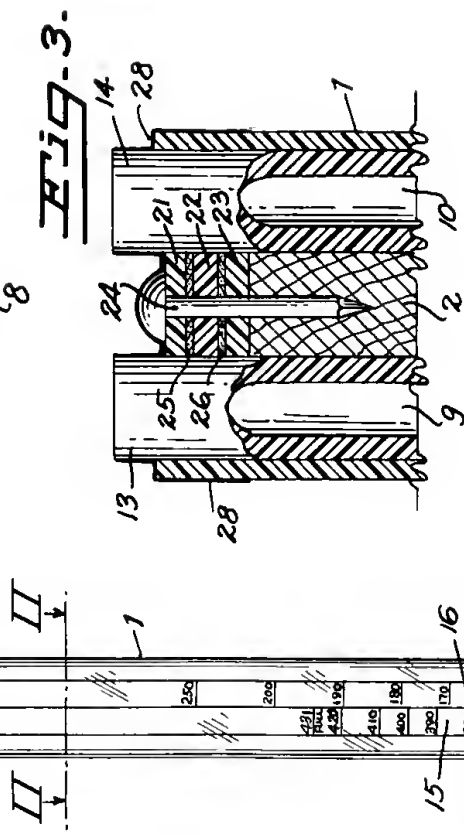
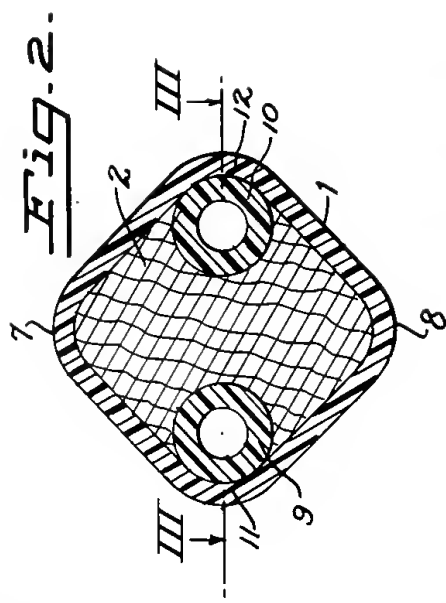
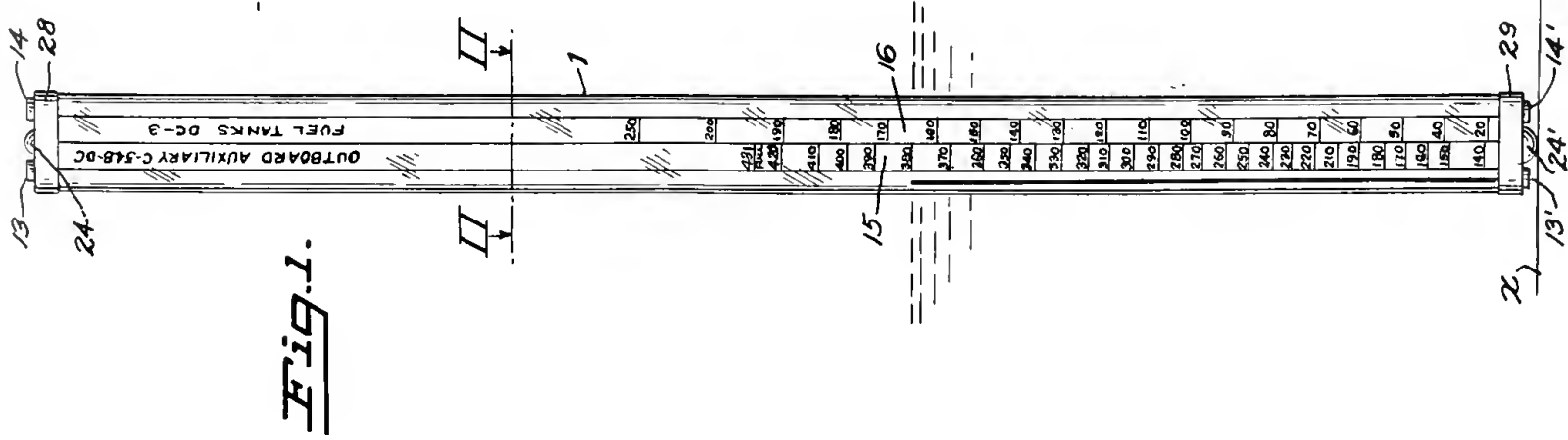
FILED

JUL 18 1957

Dec. 19, 1950

C. M. WELCH
LIQUID MEASURING GAUGE
Filed Aug. 17, 1949

2,534,644



INVENTOR.
CYRIL M. WELCH
BY *Baldwin & Co.*
ATTORNEY.

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UNITED STATES PATENT OFFICE

2,534,644

LIQUID MEASURING GAUGE

Cyril M. Welch, Milbrae, Calif.

Application August 17, 1949, Serial No. 110,711

3 Claims. (Cl. 33—126.4)

1

This invention is particularly designed and constructed to meet the exacting requirements of fuel tank gauging in airplane service, and broadly stated resides in the particular structure and mode of fabricating the gauge assembly.

Among the objects of the invention is the provision of a fuel gauge comprising a hydrostatic measuring tube open at both ends and combined with a reinforced transparent tubular body having graduated graphic scales associated with the measuring tubes and visible through the body, with the opposite ends of the body hermetically sealed around the protruding ends of the measuring tubes.

Another object is to so combine the various elements of the structure that it will withstand the severe shocks and stresses to which it is subjected in the field practice of measuring the fuel in airplane fuel tanks, such as being accidentally dropped from considerable heights, run over by landing gear and truck wheels and abusive handling by careless operators.

A further object is to maintain the accurate adjustment of the graduated scales relative to the measuring tubes and to protect it against abrasion, soiling and surface injury.

Other objects and advantages will appear as the description proceeds. In the specification and the accompanying drawings the invention is disclosed in a specialized form. But it is to be understood that it may be embodied in other forms within the spirit of the invention as defined in the claims following the description.

In the one sheet of drawings:

Fig. 1 is a front elevation of a dual measuring gauge constructed in accordance with this invention.

Fig. 2 is an enlarged detail of the same in cross section on the line II—II Fig. 1.

Fig. 3 is a similar detail in vertical section on the line III—III Fig. 2.

Fig. 4 is an enlarged detail in isometrical perspective of the end portion of the reinforcing bar.

In detail the structure shown in Fig. 3 comprises the square tubular body 1, preferably of transparent plastic such as butyrate.

The square reinforcing bar 2, preferably of Port Orford cedar or other suitable material combining strength with lightness and freedom from warpage. This bar has the opposed longitudinal grooves 3, 4 extending its full length. The remaining corners 5, 6 are rounded to snugly fit within the rounded corners 7, 8 of the tubular body 1.

The pair of measuring tubes 9, 10 fit snugly

2

within the grooves 3, 4 and the rounded corners 11, 12 of the body 1 with their upper and lower ends 13, 14 and 13', 14' protruding beyond the length of the body tube 1. These tubes 9, 10 are forced into position and tend to wedge the assembly tightly within the body 1.

These measuring tubes 9, 10 function independently of each other relative to their respective calibrated scales 15, 16 which are cemented to the adjacent planes 17, 18 of the reinforcing bar 2 respectively. Similar graduated scales are cemented to the opposed planes 19, 20 to read with their respective tubes 9, 10 on the opposite side of the body 1. This enables the use of four scales 15 with the two tubes.

After the measuring tubes and reinforcing bar are assembled within the tubular body 1, as in Fig. 2, the ends of the body extending beyond the length of the bar 2 are filled and hermetically sealed by laminated plugs such as shown in Fig. 3. These plugs are composed of the superimposed laminations 21, 22, 23 die cut from sheet plastic to the outline of the end of the bar 2, with a central hole for the round headed nails. The heavy 25 plastic cement layers 25, 26 are interposed between the laminations in sufficient quantity to exclude beyond the marginal edges of the laminations. The laminated plugs are then inserted into the opposite ends of the body 1, and the nails 24, 24' are driven into the opposite ends of the reinforcing bar 2. This compresses the laminated plugs so that the cement layers 25, 26 are forced outwardly against the inner surfaces of the body ends and around the tubes 9, 10 and into the intervening interstices. This hermetically seals the tube ends against entrance of the tank fuel when the gauge is immersed therein.

As a further precaution in sealing the ends of the gauge they are immersed in a plastic solution 28, 29 up to about the height of the end plugs. This solution which is preferably of a distinctive color coats the body ends with a lacquer coating which will completely seal the texture and interstices of the plugs and the body ends 28, 29 to which they adhere, and conceal the unsightliness of the laminated plugs.

The invention operates substantially as follows: The operator grasps the upper portion of the gauge and lowers the lower end 29 into the fuel tank until it touches the bottom X. With the gauge approximately vertical the fuel enters the lower ends 13' and 14' of the measuring tubes 9 and 10 up to the top level of the fuel within the tank. The operator then presses his bare thumb or finger over the top of the selected

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secure by Letters Patent is:
Having fully described this invention and its mode of operation what I claim and desire to

No references cited.

CYRIL M. WEICHER.

plugs when said nails are driven into the op-

posite ends of said bar respectively.
3. A liquid measuring gauge comprising a square tubular body of transparent material; a reinforcing bar snugly fitting within said body with its opposite ends spaced back from the opposite ends of said body respectively and having longitudinal grooves in two of its opposed corners; transparent measuring tubes within said grooves respectively with their opposite ends extending beyond the length of said body; laminated plugs hermetically sealing the opposite ends of said body and consisting of superimposed layers of sheet material fitting the contours of said ends with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against the ends of said reinforcing bar; pressed against the ends of said reinforcing bar; and nails extending through the said plugs in the opposite ends of said body and having heads bearing against said plugs for compressing said

body when said plugs are compressed against the ends of said reinforcing bar.
2. A liquid measuring gauge comprising a tubular body of transparent material; a reinforcing bar within said body and having grooves therein; transparent measuring tubes within said grooves with their opposite ends extending beyond the length of said body; and laminated plugs hermetically sealing the opposite ends of said body and consisting of superimposed layers of sheet material fitting the contours of said ends with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against

the entrance of liquid within said body surrounding said measuring tubes.
1. A liquid measuring gauge comprising a tubular body of transparent material; a reinforcing bar within said body and having grooves therein and graduated scales thereon on opposite sides of said grooves; transparent measuring tubes within said grooves with their opposite ends extending beyond the length of said body; and plugs in the opposite ends of and hermetically sealing the ends of said body against the entrance of liquid within said body surrounding said measuring tubes.

1. A liquid measuring gauge comprising a

PLAINTIFF'S EXHIBIT No. 12

Pan American World Airways System
Pacific-Alaska Division, San Francisco 19, California

June 10, 1948.

Plastic Process Company, Inc.,
55 New Montgomery Street,
San Francisco 5, California.

Attention: Mr. C. M. Welch
Gentlemen:

Enclosed please find three copies of our drawing number D32.061.114 on "Fuel Tank Dip Stick Assembly". Our purchase order will be issued for 100 units, based on your quotation dated June 6, 1948, with reservations for re-ordering replacement quantities and possible supply quantities for our other Divisions.

We have altered the design of these sticks, from the original sample, to incorporate solid plastic blocks in each end for additional strength. We are assuming that this change will not increase the cost by more than twenty-five cents per unit. Please advise if any further price adjustment will be necessary.

The graduation chart original, from which you should make the printed reproduction, is being sent to you under separate cover to avoid damage in mailing.

This liquid column type dip stick was developed

used as above described.

The particular merit of the present structure of the gauge is the maximum of strength with a minimum of weight, the clear visibility of the graduated scales protected behind the transparent walls of the tube 1, the laminated structure and manner of cementing the end plugs into the tube 1 preventing separation of the various parts of the assembly and the nail head 25 frees the lower ends 13' and 14' of the tubes from clogging by sedimentary deposits upon the bottom X of the tank, the presence of which is indicated in the lower content of the tube.

The body 1, tubes 9, 10, and the laminated

plugs are preferably composed of butyrate plastic material which may be bonded and cemented together by amyl acetate as a solvent assuring proper chemical reactions to that end. However there are equivalent substitutions that may be available in the plastic art without departing from the present objects of this invention.

The octane values of the various gasoline fuels are distinguished by color tints introduced into the fuels by the producer. These colors such as green for 90 octane and red for 130 octane, clearly define the height of the column in the selected transparent measuring tube.

Having fully described this invention and its mode of operation what I claim and desire to

secure by Letters Patent is:

1. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

2. A liquid measuring gauge comprising a tu-

bular body of transparent material; a reinforc-

ing bar within said body and having grooves

therein; transparent measuring tubes within said

grooves with their opposite ends extending be-

yond the length of said body; and laminated

plugs hermetically sealing the opposite ends of

said body and consisting of superimposed layers

of sheet material fitting the contours of said

ends with adhesive cement interposed between

said layers which will exude and adhere to said

body when said plugs are compressed against

the ends of said reinforcing bar.

3. A liquid measuring gauge comprising a

square tubular body of transparent material; a

reinforcing bar snugly fitting within said body

with its opposite ends spaced back from the op-

posite ends of said body respectively and having

longitudinal grooves in two of its opposed cor-

ners; transparent measuring tubes within said

grooves respectively with their opposite ends ex-

tending beyond the length of said body; lami-

nated plugs hermetically sealing the opposite

ends of said body and consisting of superim-

posed layers of sheet material fitting the con-

tours of said ends with adhesive cement inter-

posed between said layers which will exude and

adhere to said body when said plugs are com-

pressed against the ends of said reinforcing bar;

and nails extending through the said plugs in

the opposite ends of said body and penetrating

the ends of said reinforcing bar and having heads

bearing against said plugs for compressing said

plugs when said nails are driven into the op-

posite ends of said bar respectively.

4. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

5. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

6. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

7. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

8. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

9. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

10. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

11. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

12. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

13. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

14. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

15. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

16. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

17. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

18. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

19. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

20. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

21. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

22. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

entrance of liquid within said body surrounding

said measuring tubes.

23. A liquid measuring gauge comprising a

tubular body of transparent material; a rein-

forcing bar within said body and having grooves

therein and graduated scales thereon on opposite

sides of said grooves; transparent measuring

tubes within said grooves with their opposite

ends extending beyond the length of said body;

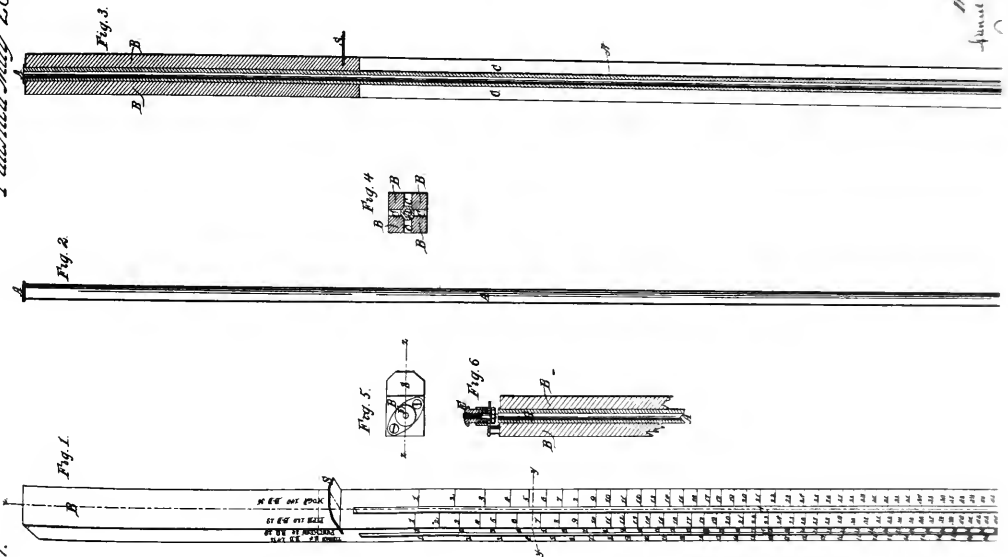
and plugs in the opposite ends of and hermeti-

cally sealing the ends of said body against the

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Approved
James B. Hyde.

Noted
James B. Hyde.



Patented May 23, 1938

2,988,221

James B. Hyde

By J. C. D.

U.S. PATENT OFFICE

720

to satisfy our needs for an accurately calibrated, durable airplane fuel quantity measuring device which can be read easily under all operating conditions. In testing the durability of the sample stick, we threw it to the concrete hanger floor from a height of twenty feet with full force, to obtain an accelerated service test of repeated dropping from the airplane wing. After the ninth time it cracked the end, therefore, although it far exceeded our expectations, we have incorporated solid plastic blocks in the end to make it even more durable. The cellulose acetate butyrate plastic sticks will undoubtedly far exceed the durability of the wooden sticks now used by us and most airline operators, due to its high resistance to impact, abrasion, hydrocarbons and discoloration.

There should be a demand for this plastic stick among other operators and merely by changing the calibration slip, it could be adapted to aircraft types other than the DC-4.

This letter will constitute release of the design to you to market as you see fit.

Very truly yours,

PAN AMERICAN AIRWAYS,
Inc.,

/s/ J. W. WESNER,

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DANIEL C. HYDE, OF NEW YORK, N. Y.

IMPROVEMENT IN GAGING-RODS FOR LIQUOR-CASKS.

Specification forming part of Letters Patent No. 38,681, dated May 26, 1863.

To all whom it may concern:

Be it known that I, DANIEL C. HYDE, of the city, county, and State of New York, have invented a new and useful improvement in "wantage" or gaging-rods for determining the liquid contents of casks; and I do hereby declare that the following is a clear and exact description thereof, reference being had to the accompanying drawings, making a part of this specification.

Figure 1 is a perspective view of one of my improved wantage or gage rods; Fig. 2, a view of the transparent indicating-tube, constituting the main feature of my invention; Fig. 3, a longitudinal section in the line *xx* of Fig. 1. Fig. 4 is a transverse section of my instrument in the line *yy* of Fig. 1; Fig. 5, a top or end view of my improved gaging-rod when fitted with a spring-valve; and Fig. 6 a partial section in the line *zz* of Fig. 5, showing more clearly the details and arrangement of the top valve and spring.

My invention is designed to ascertain either the wantage in a cask or package of liquid, or the amount of fluid contained therein, with more certainty, ease, and accuracy than can be done with the instruments heretofore used for this purpose. Its principal feature consists of an indicating tube or cylinder, A, Figs. 2 and 1, made of transparent glass, or its equivalent, and left open at either end. By immersing such a tube in any liquid the fluid particles will immediately rise therein to the height of their proper level. If, however, the upper end or orifice of the tube be hermetically closed before it is withdrawn from the liquid the simple pressure of the atmosphere will prevent so much as is contained in the tube from escaping upon its emersion therefrom and retain it confined in a fixed position therein, so long as the tube is kept in a vertical position, or until the orifice be reopened. It is evident that the height of the column of liquid thus confined in the tube will indicate the depth of its previous immersion in the body of the fluid, and by comparing this column with a properly-graduated scale the quantity of liquid in any given cask or vessel can be accurately ascertained almost at a glance.

In manufacturing my improved wantage and gaging rods for ordinary purposes I inclose the entire length of the indicating-tube A within the center of a square slitted rod, B, Fig. 1,

made of wood, metal, gutta-percha, or any other suitable material, so that either end of the rod shall be flush with the ends of the closed tube. Suitable gaging-scales are laid or marked off upon the four sides or faces of this square rod, each adapted to a particular form or size of cask, designated at the top of the scale by letters and figures denoting, first, its capacity, and, next, its bung diameter.

The graduation of my improved instrument is similar to that found upon the gaging-rods now in use, and to insure accuracy is made thereon by a graduating-machine. Central slits, C C, Figs. 1 and 4, are cut through the rod at right angles with each other, and extend up from its foot to the initial point of the scales marked upon its sides, the lower end of the rod being bound with a suitable metallic ferrule, D, Fig. 1. The indicating-tube A is inserted and secured within a longitudinal aperture formed in the center of the rod at the intersection of these open slits C C, as shown in the cross-section, Fig. 4, and is visible through the same upon each of the graduated faces of the bar or rod.

The indicating-tube A in my improved wantage or gaging rod may be closed hermetically at pleasure by the simple pressure of the finger upon its upper end, which is finished off evenly for the purpose, as illustrated in Figs. 1 and 3 of the accompanying drawings; but, to perfect the instrument, I intend to secure upon the top end of the rod B a simple, spring-actuated valve, O, Fig. 6, made of rubber or other elastic material, for the purpose of closing tightly the orifice of the tube, as shown in Figs. 5 and 6. In this valve arrangement the resistance of the spiral valve-spring is overcome and the valve O closed down as a cushion upon the end of the tube by simple pressure upon the head or button E, Figs. 6 and 5.

In ascertaining the wantage in any given cask my improved wantage rod is inserted therein through its bung-hole until a suitable stop, S, Figs. 1 and 3, projecting from one side of the rod in a proper position with reference to the graduated scale thereon, will catch under the bung-stave. The orifice at the upper end of the indicating-tube is then closed by pressure of the finger thereon, either directly, as in the rod, Fig. 1, or through a valve, E O, as in Fig. 6, and the instrument withdrawn.

The height of the column of liquid retained

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in the transparent tube will, by reference to the scale graduated for a cask of the capacity given, suffice to determine the number of gallons wanting therein. Upon releasing the valve or removing the finger from the orifice of the tube its contents will at once flow out. By the same process either the contents or "ullage" of a cask may also be accurately obtained.

Although I prefer to protect and arrange the indicating-tube A in the manner herein described, I do not limit my claim to the particular form of rod here given. The tube may be protected and combined with the necessary scales and the rod manufactured in many different forms or styles. In fact, my improved gaging-rod may be made wholly of glass or other transparent material with graduated scales marked directly thereon. Hence,

In presence of—
JOHN H. CONKLIN,
GEORGE N. CONKLIN.
D. C. HYDE.

What I claim as my invention, and desire to secure by Letters Patent, is—

1. The combination and arrangement of a transparent indicating-tube, with any suitably-graduated scale or series of scales, for the purpose of ascertaining and measuring the liquid contents of casks or other vessels, substantially as herein set forth.

2. The combination of a suitable valve, O, or its equivalent, with the end of a transparent indicating-tube, A, substantially as and for the purpose herein set forth.

This specification of my improvement in vantage and gaging rods signed by me this 14th day of March, A. D. 1863.

39,681

2

Patented July 18, 1922.

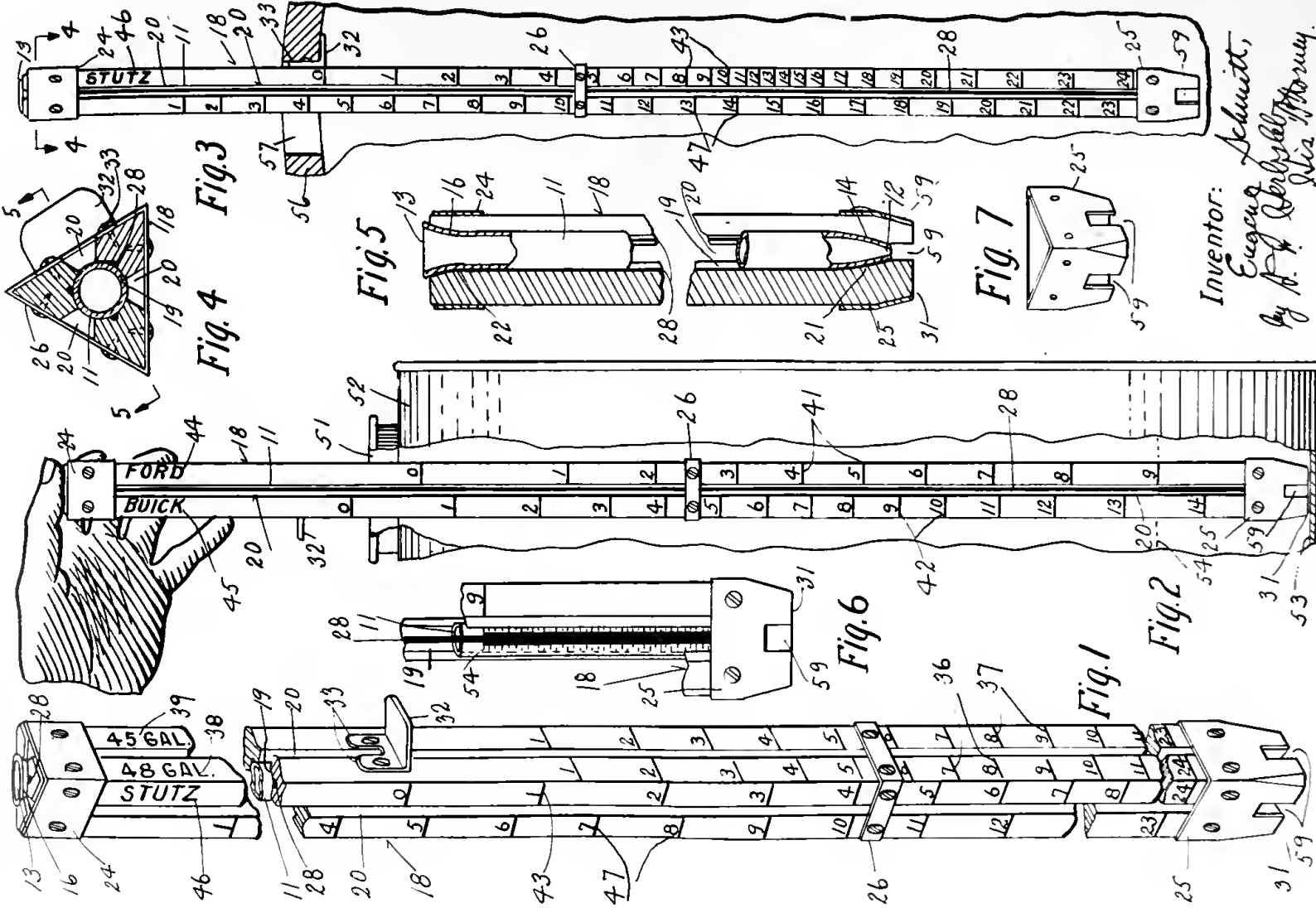
E. SCHMITT.

OUTGAUGE.

APPLICATION FILED APR. 1, 1920.

1,423,156.

Patented July 18, 1922.



Inventor:
Eugene Schmitt,
By H. A. Berghel, Attorney.

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To all whom it may concern:

Be it known that I, EUGENE SCHMITT, a citizen of the United States, residing at Cincinnati, in the county of Hamilton and State of Ohio, have invented certain new and useful Improvements in Outgauges, of which the following is a specification.

It is the object of my invention to provide a new and improved device whereby to conveniently and accurately measure without calculation the quantity of liquid which is lacking to fill a container to standard or desired extent, and to indicate the quantity of liquid which it is necessary to supply in the container in order to fill the same.

My invention is applicable in measuring the quantity of gasoline required to fill the gasoline tanks of automobiles, or to indicate the shortage in barrels containing liquid commodities, such as vinegar, alcohol, or other liquids.

It is the object of my invention further to provide a measuring tube with means which are emphasized by the presence of the liquid in the tube to readily indicate the presence and height of the liquid in the tube; further, to provide an outgauge of the character mentioned with a plurality of contacts to form the points from which the calculations for outage in the container are made; and, further, to provide an outgauge with a plurality of graduations respectively extending between said contacts and extending to both sides of one of said contacts lengthwise of the tube.

The invention will be further readily understood from the following description and claims, and from the drawing, in which latter:

Fig. 1 is a perspective view of an outgauge partly broken away, showing my invention.

Fig. 2 is a side elevation of my improved device partly broken away, showing its employment in measuring the outgauge in a gasoline tank of an automobile, the tank being partly broken away.

Fig. 3 is a side elevation of my improved device showing its employment in measuring the outage in a barrel by employment of its upper contact.

Fig. 4 is a cross-section of my improved device taken on the line 4—4 of Fig. 3.

Fig. 5 is a longitudinal axial section of my improved device taken in the plane of the line 5—5 of Fig. 4, and partly broken away.

Fig. 6 is a detail in side elevation showing the measuring tube and its support, partly broken away, and indicating the level of liquid in the tube emphasizing the indicating mark to show the presence and height of the liquid; and.

Fig. 7 is a perspective view of the lower ferrule of my improved device.

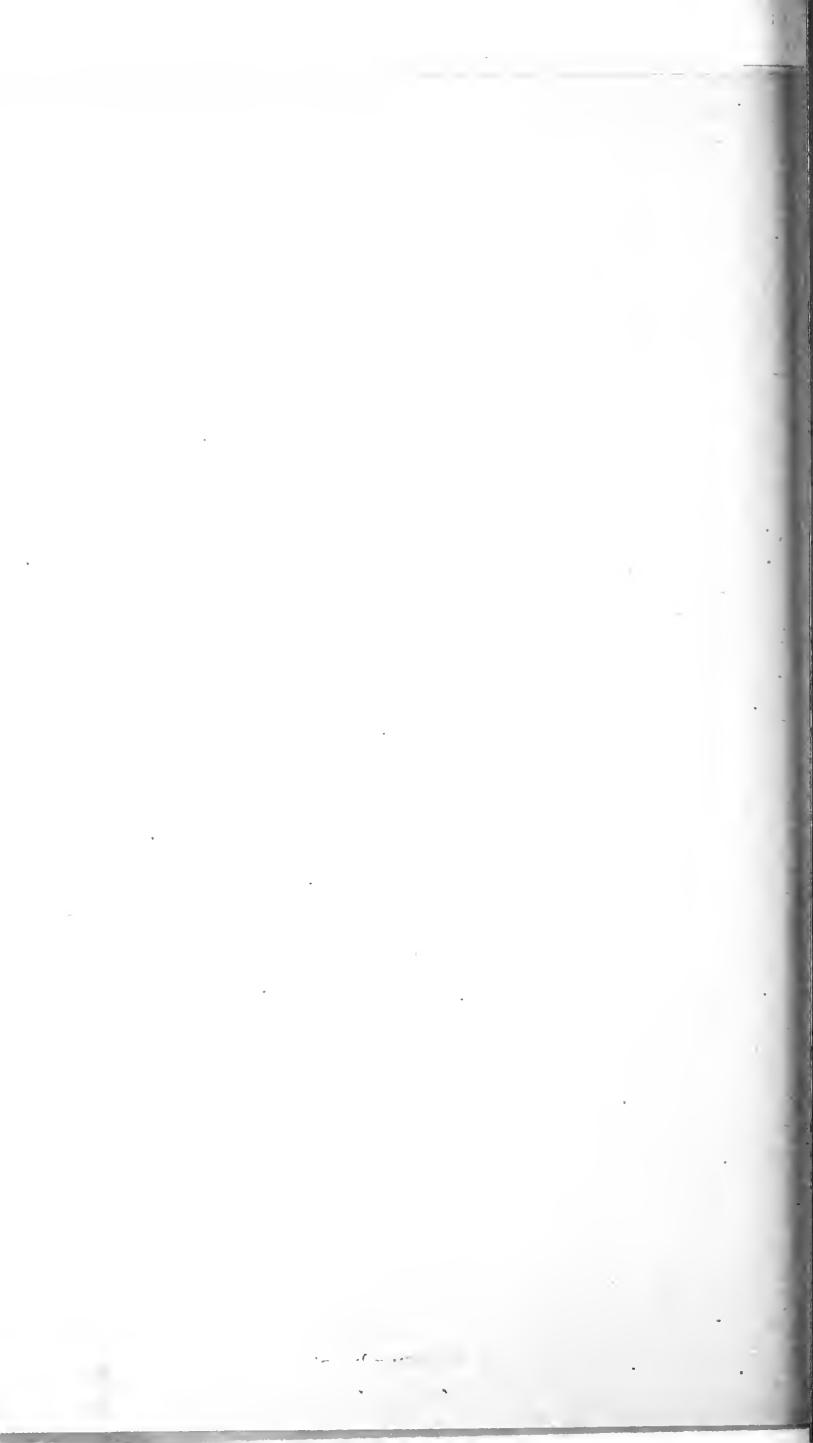
My improved outgauge comprises a tube 11, which is preferably transparent and made of glass. Its lower end is provided with an opening 12, and its upper end with an opening 13. The lower end preferably tapers, as shown at 14, toward the opening 12, in order to constrict the opening and make it of smaller cross-section than the cross-section of the tube proper, whereby to readily retain the liquid in the tube when the upper opening is closed. The upper end of the tube preferably is tapered outwardly, as shown at 16, for enlarging the upper opening, so that its cross-section is of greater area than the cross-section of the tube proper.

The tube is provided with a support, exemplified at 18, the support having a groove 19 extending lengthwise thereof for receiving the tube. I have shown three of these supports as members of an integral support arranged about the tube, and having lengthwise spaces between them, forming viewing slots 20, so that the tube may be viewed through these spaces to expose the liquid and the height of liquid in the tube.

The lower end of the support is provided with an inwardly extending seat 21, which coacts with the lower tapering end of the tube, and the upper end of the tube is provided with an outwardly extending seat 22 which coacts with the upper spreading end of the tube. The seats position the tube lengthwise. The members of the support are preferably connected, the connections being shown as consisting of an upper band 24, a lower ferrule 25, and an intermediate band 26, suitably secured to the members of the support, as by screws.

Means are provided which are arranged to be emphasized or magnified by the liquid in the tube. I have shown these means as comprising a mark 28, extending lengthwise of the tube, and so arranged that the mark may be viewed through the tube. This mark is preferably of different color from the color of the portion of the support seen through the tube, being for instance a black

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No. 15540

In the

United States Court of Appeals

For the Ninth Circuit

C. MARTIN WELCH,

Appellant,

VS.

EUGENE L. GRINDLE,

Appellee.

Appellant's Opening Brief

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No. 15,540

In the
United States Court of Appeals
For the Ninth Circuit

C. MARTIN WELCH,

Appellant,

VS.

EUGENE L. GRINDLE,

Appellee.

Appellant's Opening Brief

STATEMENT AS TO JURISDICTION

This is an appeal from the January 3, 1957 Judgment and Decree (TR. 73)* of the United States District Court, Northern District of California, Southern Division, adjudging that Patent No. 2,534,644 is void and invalid, as to all three of its claims; enjoining and directing Appellant to inform past purchasers and others that the subject devices are not patented; enjoining and directing Appellant to so inform said past purchasers by a written notice; enjoining Appellant from marking the subject devices with a patent

*For convenience, reference to the Transcript of Proceedings is made by the abbreviation TR. followed by the page number of reference.

notice, and decreeing that each party bear its own costs entered herein on January 4, 1957.

The jurisdiction of the District Court as to both the original and Amended and Supplemental Complaint was predicated upon the assertion that this was a cause that arose under the patent laws of the United States of America.

The answer denied that an actual controversy existed between Appellant† and Appellee concerning any subject matter properly or lawfully cognizable in the District Court and denied that the District Court had jurisdiction over the non-federal aspect of the case, namely, the prayer for an order directing Appellant to assign his patent to Appellee (TR. 8-17).

This Court has jurisdiction to review the Judgment in question by virtue of 28 USC § 1291 and 1292 (4).

STATEMENT OF THE CASE

A. The Nature of the Controversy

This was a suit for declaratory judgment seeking an adjudication that Welch Patent 2,534,644 is invalid and void; that an order be executed decreeing that the Letter Patent be assigned to Appellee; that judgment be entered decreeing that Appellee has the right to manufacture and sell the subject devices; that Appellant Welch be enjoined from further manufacture and sale of the subject device; that Appellant be ordered to account to Appellee for damages suffered by Appellee by reason of having been prevented from entering into the manufacture and sale of the subject devices; and for costs and attorneys' fees (TR. 3-8).

†Throughout this brief Appellant Welch will alternately be designated as "Appellant" or "Welch" and Appellee Grindle will alternately be designated as "Appellee" or "Grindle".

Appellant's answer (TR. 8-17) joined issue by denying the allegations of the complaint and asserting as special defenses that the Court was without jurisdiction in that the cause was based upon a claim justiciable in the Courts of the State of California and there was no genuine or actual controversy existing between the parties relative to validity or infringement.

Additionally, the answer set up the defenses that the action was barred by the applicable statute of limitations; that Appellee was guilty of gross laches and acquiescence; that Appellee was estopped to maintain the action; that Appellee had actively participated in the granting of a release to Appellant and was, therefore, estopped; that Appellant was duly licensed to make the subject devices; that the action was a sham action that should be dismissed; and that Appellee's claim was stale.

At the conclusion of Appellee's case, Appellant moved the District Court to dismiss the complaint upon the grounds (TR. 356-364):

(a) That the Court lacked jurisdiction because the question of title to the Letters Patent is not an action arising under the patent laws, but rather a patent right or ownership question based on common law or equity which, in the absence of diversity, is within the jurisdiction of the state courts.

(b) That the Court lacked jurisdiction because there was no such justiciable controversy between the parties as was cognizable under the Declaratory Judgment Statute, but rather a mere desire upon the part of Appellee to make the patented structure.

(c) That the action was barred by the applicable statute of limitations and presented a stale claim and

that Appellee was, by a release, estopped to maintain the action.

These motions were taken under advisement (TR. 40-710) but were never specifically ruled on. The inference to be drawn from the Court's final determination (TR. 5-64) of the case is that they were denied.

During trial an Amended and Supplemental Complaint was filed purporting to conform to the evidence (TR. 1-23).

After a trial on the merits, the District Court filed a Memorandum Order of decision (TR. 54-64) holding the Appellant's patent invalid. Thereafter, the District Court adopted Findings of Fact and Conclusions of Law (TR. 64-73) and on January 4, 1957, entered a Judgment and Decree (TR. 73-75).

Both parties noticed appeals on February 4, 1957 (TR. 75 and 78, respectively). The appeal of the Appellee, Grindle, was subsequently dismissed upon Stipulation and Order. The Stipulation and Order was transmitted as a part of the record (TR. 710-711) but not printed in the transcript.

B. The Environment in Which the Welch Invention Was Made

The subject matter of the patent in suit is a Liquid Measuring Gauge, particularly adapted for use in gauging the gas content of airplane wing tanks. Commonly called a "Dipstick", the device is an elongated, stick-like rectangular tube of transparent plastic material with sealed ends, housing a wooden reinforcing core, opposite corners of which are routed to accommodate open ended gauging tubes which project through the end seals. A printed graduated scale is wrapped around the wooden core and viewable

through the outer shell to determine the gallonage measured in a given or selected gauging tube.

In use the Dipstick is inserted through a top opening in an airplane wing tank and lowered to contact the bottom thereof and the operator, by placing his finger over the upper end of a selected measuring tube, can entrap a fluid column therein to be read against a scale for the particular model of aircraft and wing tank and thus determine the remaining supply of fuel.

Prior to the Welch invention various devices had been employed for the purpose, some with no success and some with indifferent success. Some were made of wood and some of metal. They were exhibited to the Trial Court as Plaintiff's Exhibits K-1, L-1, M-1, N-1 and O-1. Appellee, Grindle, was assigned the task by his employer, Pan-American, of developing a satisfactory Dipstick (TR. 87) :

"* * * the reason being that they had difficulty with wooden sticks in chipping and clogging valves, and the fact that the sticks broke quite easily, and mainly that the calibration on the sticks was in question."

Appellee, Grindle, made several abortive attempts to solve the problem and finally, in April of 1948, came up with a concept that envisioned a Dipstick that would be made by an extrusion of plastic material. He then sought the aid of experienced plastics people and was directed to Appellant, Welch, upon checking into the matter, advised Grindle that the extrusion device would be too expensive to make and was impracticable. At the same time he disclosed to Grindle a structure that could be made to serve the purpose. That device met with the approval of Grindle's employer Pan-American, and Welch was given an order for the manufacture and delivery of a supply of the devices. At the same time Pan-American executed in Welch's favor a release

letter that had been authored by Appellee, to market the devices as Welch saw fit. This Welch proceeded to do. He also filed application for and was granted Letters Patent on the structure he had disclosed to Grindle.

The controversy came before the District Court on the complaint of Grindle (not Pan-American) seeking title to the patent or a declaration of its invalidity.

SPECIFICATION OF ERRORS

The following errors are specified as those which will be urged in support of this appeal:

1. The District Court erred in finding that there existed between the parties a justiciable controversy for declaratory judgment within the meaning of 28 USC 2201.

2. The District Court erred in failing to find and conclude that Appellee Grindle's cause of action was a state claim, barred by the applicable California Statute of Limitations.

3. The District Court erred in failing to find and conclude that Appellee Grindle, by virtue of a release or license was estopped to maintain the asserted cause of action.

4. The District Court erred in denying Appellant Welch's Motion to Dismiss the asserted cause of action for declaratory judgment and in assuming jurisdiction over the non-federal questions relating to the assignment of the patent and damages.

5. The District Court erred in adjudging Letters Patent 2,534,644 void because the application was not filed by the true inventor.

6. The District Court erred in adjudging Letters Patent 2,534,644 void because the Dipstick disclosed and claimed in the patent was in public use or on sale for more than one year before the application was filed.

7. The District Court erred in denying Appellant's motion to reopen the case for the introduction of further evidence bearing on the asserted defense of prior public use or sale of the invention forming the subject matter of Letters Patent 2,534,644.

8. The District Court erred in adjudging Letters Patent 2,534,644 void because the Dipstick disclosed in the patent was published in drawing D-32.061.114 more than one year before the patent application was filed.

9. The District Court erred in adjudging that each of the three claims of patent No. 2,534,644 is invalid because it fails to define invention over the prior art, particularly Hyde and Schmitt.

10. The District Court erred in failing to adjudge Appellee Grindle guilty of laches and to dismiss the action for that reason.

11. The District Court erred in failing to find Appellee Grindle had acquiesced in Appellant Welch's manufacture and sale of the subject devices in a manner and to an extent that barred the maintenance of the action and to dismiss the suit for that reason.

12. The District Court erred in failing to treat the suit as one based upon a stale claim the prosecution of which gave rise to circumstances meriting an award of reasonable attorneys' fees and in failing to make such an award.

13. The District Court erred in ordering Appellant Welch to discontinue the marking of the subject devices with No. 2,534,644 and to notify his customers and prospective customers that the subject devices were not patented.

SUMMARY OF ARGUMENT

- I. The District Court Finding That a Justiciable Controversy for Declaratory Judgment Existed Between the Parties Was Clearly Erroneous.
- II. Appellee's Cause of Action Was a Stale Claim, Barred by the Applicable California Statute of Limitations and It Was Clearly Erroneous for the District Court to Fail to So Find and Conclude.
- III. The Failure of the District Court to Find and Conclude That Appellee, By Virtue of a Release or License, Was Estopped to Maintain the Asserted Cause of Action Was Clearly Erroneous.
- IV. The Adjudication That Appellant Was Not the True Inventor of the Subject Device Was Clearly Erroneous.
- V. The Holding That the Patented Dipstick Had Been in Prior Public Use or Sale and the Refusal to Reopen the Case for Further Evidence on That Point Was Clearly Erroneous.
- VI. The Treatment of the Pan-American Drawing as a "Prior Publication" Was Clearly Erroneous.
- VII. The Finding of the District Court That the Welch Patent Did Not Define Invention Over the Prior Art Was Clearly Erroneous.
- VIII. Appellee Was Guilty of Laches and Acquiescence with Respect to Appellant's Manufacture and Sale of the Subject Devices and the Action Should Have Been Dismissed on Those Reasons.
- IX. Appellee's Prosecution of His Stale Claim Gave Rise to Circumstances Meriting an Award of Attorney's Fees to Appellant.
- X. The District Court's Order Requiring Appellant to Discontinue the Patent Marking of the Devices and to Notify Customers Was Also Improper.

I.

he District Court Finding That a Justiciable Controversy for Declaratory Judgment Existed Between the Parties Was Clearly Erroneous.

Under this heading we will couple items 1 and 4 of the statement of Points (TR. 14) on which Appellant relies.

The Trial Court found that Appellee, upon discovering that Appellant had patented the Dipstick and that Appellant had developed the manufacture of the Dipsticks into a profitable venture, decided to also enter into the manufacture and sale of Dipsticks and that Appellant thereupon threatened an infringement suit (TR. 70). Upon this basis the Court concluded that a justiciable controversy existed between the parties.

When the full record is examined it is believed eminently clear that as of the time of the filing of the complaint there was no *actual controversy* within the meaning of the Declaratory Judgment Act and the finding and conclusion in that respect were clearly erroneous. Instead of an actual controversy there existed an incident of Appellee's provoking, but one utterly lacking in the *bona fides* contemplated by the statute and for this reason the so-called federal cause should have been dismissed.

As of the filing of the complaint (March 25, 1955) Appellee was employed by Pan-American World Airways (TR. 2). He was not then in the business of manufacturing Dipsticks, but he had formed the "intent" to do so (TR. 167). He had *not* ordered the necessary plastic extrusion and gave this as his reason (TR. 168):

"Q. Why haven't you gone ahead and ordered this plastic extrusion?

A. Well, primarily because it involves the expenditure of several thousand dollars, and I didn't want to

go to that expense and also be faced with possible legal action from Mr. Welch."

Upon this background, Appellee provoked the incident which he urges gave rise to the existence of an actual controversy. He did it by scheduling a meeting in the office of his attorneys with Appellant and J. Bruce Fratis, Esquire, his counsel. This followed an exchange of correspondence in which Appellee had demanded and had been refused an assignment of the Welch Patent (TR. 165).

Accepting, *arguendo*, the Appellee's version of what ensued, it appears that:

"* * * Mr. Flehr, my attorney, asked Mr. Welch if he would prosecute me or bring an action against me *if* I were to produce the type of dipstick contained in Plaintiff's Exhibit 8.

Mr. Welch informed us very definitely that he would prosecute me *if* I did." (Emphasis supplied.)

We say we accept it *arguendo* because there is a decided conflict between the two versions of what had actually transpired (Cf. Welch's testimony, TR. 558-561). But even that as it may, the best version offered by Appellee, when coupled with a mere formation of intent to do something, does *not* make out a justiciable controversy within the contemplation of the statute.

While it is fully appreciated that the Declaratory Judgment Statute (28 USC 400) has been liberally construed with respect to what constitutes a justiciable controversy, it is respectfully submitted the line should be drawn not to exclude situations clearly indicative that the real object is, as here, the obtaining of an advisory opinion.

This Court's decision in *Crowell v. Baker Oil Tools, Inc.*, 143 F.(2d) 1003, 62 U.S.P.Q. 176, is generally recognized as

extremely liberal in its finding that an actual controversy existed, but even that case will not bear a valid construction supporting Appellee's cause. Factually the case is distinguishable, mainly because Baker had once sued Crowell for infringement of the patent in suit and had dismissed without prejudice. Crowell "had made several devices infringing the appellee's patent if valid"; intended to make more and had "proceeded to have available a large stock of piping necessary for their manufacture". This fact pattern was held sufficient to invoke the right to sue the patent owner under the Declaratory Judgment Act and this Court expressed the view that Crowell "well may assume that he is in jeopardy of an injunction."

But that case is not to be interpreted as a blanket approval of every case as presenting a justiciable controversy, especially where the basic premise is nothing more than the expression of a desire or declaration of intent to engage in an enterprise, coupled with entrapment or solicitation of words that can be tortured into a charge of infringement. In other words, can an "actual controversy" be brought into existence by the naked declaration of intent to embark upon the manufacture of a particular patented device and an inquiry to the patentee along the lines of "what will you do if I do so?", regardless of the patentee's response? It is submitted that it aborts the statute to sanction an action brought upon such an ephemeral premise. See:

Atlas Imperial Diesel Engine Co. v. Lanova Corp.,
79 F.S. 1002, 78 U.S.P.Q. 319, 322.

The following language was employed in *Federal Tel. & Radio Corp. v. Associated Tel. and Tel. Co.*, 71 F.S. 877, 73 U.S.P.Q. 80, 82, to draw a sensible line and one clearly excluding Appellee's asserted cause:

"The construction of the Declaratory Judgment Act while liberal, must be a reasonable construction and confined within definite limits. The Act must not be made a vehicle of oppression by which the holders of patents can be haled into court, without cause, in defense of their patents when no actual controversy as to such patents exists, but only a desire by some plaintiff for an advisory opinion upon some feature related thereto, or to remove the patent as a possible cloud upon his own process or a limitation on his activities. As said in *Coffman v. Breeze Corporation*, 'It is quite clear that a declaratory judgment procedure is available in the federal courts only in cases involving an actual case or controversy * * * where the issue is actual and adversary * * *, and it may not be made the medium for securing an advisory opinion in a controversy which has not arisen'".

The preceding remarks are directed to the complaint *filed* herein since that was the target for Appellant's original Motion to Dismiss, which was denied. It is appreciated that the complaint was, during trial, amended and supplemented to conform to the evidence, but Appellee's conduct after March 27, 1955, was self-serving and ineffectual as curative.

That part of the original complaint which sought to invoke the Declaratory Judgment Statute is additionally seen as a scheme and device conjured up by Appellee to give the District Court token jurisdiction over the claim for non-assignment of the patent. The latter cause was non-federal and, as between citizens of the same state, was justiciable in the courts of California. Its obvious staleness undoubtedly prompted Appellee to join the asserted causes in the District Court in the hopes of obtaining an order for assignment or a declaration of invalidity.

For the reasons above set forth it is submitted the District Court should have granted Appellant's Motion to Dismiss for lack of a justiciable controversy and its failure to do so was clearly erroneous.

II.

Appellee's Cause of Action Was a Stale Claim, Barred by the Applicable California Statute of Limitations and It Was Clearly Erroneous for the District Court to Fail to So Find and Conclude.

The Welch patent issued on December 19, 1950, and within the next several weeks all dipsticks were manufactured with the patent number thereon (TR. 491 and Defendant's Exhibit F-1), including ones sold to Pan-American. Prior to issuance of the patent, Appellant had caused the "Patent Pending" notice to be affixed, first by rubber stamping the charts (Defendant's Ex. C-1) and then by printing it on them (Defendant's Ex. D-1 and E-1). The earliest use of the "Patent Pending" notice occurred in the last half of 1948 (TR. 486-491).

Appellee disclaims all knowledge of the pendency of the Welch application or issuance of the patent prior to *September 1953* (TR. 157-158) despite the Appellant's use of the pendency and patent notices on articles supplied to his employer, Pan-American, and offers the feeble excuse that he was, in effect, insulated against seeing what was there or all the rest of the world to see, because he was assigned a new position. That new position was Technical Assistant to the Chief Flight Engineer. He said he didn't believe he had anything whatever to do with dipsticks after June 10, 1949 (Plaintiff's Ex. 21) notwithstanding the fact that he was liaison between the (a) Operations Department, (b) the Maintenance Department, (c) "such other departments that we may have to deal with in the operation's group",

and (d) the flight crews, and these are the very people who are constantly using dipsticks (TR. 155-156).

Of equal significance was the fact that Appellee was then on friendly terms with Appellant and was seeing him on a social basis at Appellant's home in Millbrae where the dipsticks were initially made and were in plain sight for all to see. This friendship continued for the period 1949 to at least May 27, 1953, and the dipsticks, with the patent pending and patent notices affixed thereto, were openly exposed to Appellee's view during the course of that friendship as well as in their normal use by Pan-American. The social exchanges between the parties were varied but definitely included many visits by Grindle to the Welch home in Millbrae where the dipsticks were assembled in the years 1949-1950 in a working area of the basement. Later a workshop was built there and used for inspection and shipment of the articles. Grindle visited and spent time in the workshop area of the Welch home and the rumpus room right next to it (TR. 506-11).

Welch made no effort to conceal from Grindle or anyone else the fact that dipsticks were being fabricated or assembled in his basement. The belief was expressed that everyone that came to the Welch home during the period in question "saw us either working on dipsticks, or were shown dipsticks or handled them in some fashion". The project was carried on upstairs and down and the family was proud of it (TR. 508).

When these prevailing conditions and facts are borne in mind, the Appellee's denial of knowledge that a patent application had been filed or that a patent had been issued by Welch, until September 1953, is incredible. Appellee would have the Court believe that, like the ostrich with head in sand, he was carefully insulated from the acquisition of

knowledge otherwise plainly evident to him at Pan-American and the Welch home.

The reasonable inferences to be drawn from the facts alluded to are that Grindle had actual knowledge of the issuance of the Welch patent or was chargeable with knowledge of it at least as early as its issuance date (December 9, 1950). Moreover, the presence of the "patent pending" notice on the articles prior to issuance of the patent was sufficient to alert Grindle to the Welch claim and put him on notice as to the prospect of issuance of the patent. It is submitted that a prudent person, harboring a quiescent claim of inventorship, would be aroused upon seeing an article embodying his claimed invention produced by another and bearing a "patent pending" notice. Certainly a prudent person would not delay the filing of a cause seeking an order compelling assignment as the instant cause was delayed by Grindle.

Apart from the foregoing considerations which are clear enough to defeat Appellee's stale claim, Appellee had *constructive notice* of the Welch patent as early as of the date of its issuance (December 19, 1950). *This was over four years before the commencement of the action* (March 27, 1955).

In a similar situation, involving pursuit of the title to a patent, it was held that the failure to commence the action within the time prescribed in the applicable Statute of Limitations was fatal. See: *Hartley Pen Co. v. Lindy Pen Co., Inc.*, 16 F.R.D. 141, 102 U.S.P.Q. 151, 161-2, a case decided by Judge Mathes of the Southern District on June 8, 1954, and affirmed by this Court at 237 F.(2d) 294, 111 U.S.P.Q. 67. In that case, the District Court held that:

"* * * issuance of the patent and recordation in the Patent Office constitutes notice to the world of its existence."

The Court cited for that proposition the following cases: *Wine Railway Appliance Co. v. Enterprise Railway Equipment Co.*, 297 U.S. 387, 393, 28 U.S.P.Q. 299, 300 (1936); *Sontag Stores Co. v. National Nut Co.*, 310 U.S. 281, 294, 45 U.S.P.Q. 448, 454 (1940); *Sessions v. Romadka*, 145 U.S. 29, 51 (1892); *Boyden v. Burke*, 14 How. (55 U.S.) 575, 582 (1852).

The observation of the Supreme Court in the *Sontag Stores* case, *supra*, is particularly significant. It was there said (45 U.S.P.Q. 453-4):

"In the instant case *the accused machine went in operation when the owner had no actual knowledge of the original patent* but that circumstance we think ought not to defeat the defense based upon intervening rights. All patents must 'be recorded, together with the specifications, in the Patent Office in books to be kept for that purpose.' U.S.C.A. Title 35, sec. 39. *Constructive notice of their existence goes thus to all the world.* *Boyden v. Burke* (1852), 14 How. 575, 582; *Wine Ry. Appliance Co. v. Enterprise Ry. Equipment Co.* (1936), 297 U.S. 387, 393 (28 USPQ 299); *Walker on Patents*, Deller's Edition (1937) Vol. 3, p. 2176. *As a consequence the owners of the machine here accused operated it with implied knowledge of the original patent and may justly claim whatever privileges would follow actual knowledge.*" (Emphasis supplied.)

It is respectfully submitted that the rule should cut both ways, namely, if issuance is constructive notice of the existence of the Letters Patent to *create* an intervening right, it should be likewise effective to *defeat* a stale claim.

Returning now to the holding of the *Hartley* case, *supra*, it will be noted that Judge Mathes was of the opinion (102 U.S.P.Q. 161) that:

"Federal courts of equity, while not bound by state statutes of limitations except in cases where original

jurisdiction is based upon diversity of citizenship (*Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)), 'will nevertheless, when consonant with equitable principles, adopt and apply * * * the local statutes of limitations applicable to the equitable causes of action in the judicial district in which the case is heard.' (*Russell v. Todd*, *supra*, 309 U.S. at 288-289)."

The Court then noted that the applicable California statute of Limitations provides a three-year period from discovery of "the facts constituting the fraud" (*Cal. Code Civ. Proc.* § 338 (4)) (Cf. *Cal. Civ. Code* § 2224; *Cal. Code Civ. Proc.* § 343; *Burns v. Ross*, 190 Cal. 269, 212 Pac. 17 (1923); see *Dabney v. Philleo*, 38 Cal. (2d) 60, 237 P.(2d) 48 (1951); *Neet v. Holmes*, *supra*, 25 Cal. (2d) 447, 154 P.(2d) 854) and ruled that the facts of public record appeared to have placed the intervenor on constructive notice well more than three years prior to action taken.

The Court concluded its opinion with the following (102 U.S.P.Q. 162):

"Since the claim of title, as now pleaded in intervenor's complaint, would be barred by applicable state statutes of limitation if asserted in the courts of California (cf. *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P.2d 958, 971-975 (1945)); the claim should be held barred here. (*Guaranty Trust Co. v. York*, *supra*, 326 U.S. at 107-112; *Russell v. Todd*, *supra*, 309 U.S. at 287-289, 293-294)."

An additional authority calling attention to the considerations and applicable legal principles is the decision in *Whitman v. Walt Disney Productions, Inc.*, 148 F.S. 37, 112 U.S.P.Q. 220.

It follows that Appellee, having had constructive notice of the issuance of the Welch patent as early as December

19, 1950, was barred from maintaining an action commence March 27, 1955, or more than three years after the effective date. Appellee's position before the Court was not alleviated by the repeated assertion that he did not discover the alleged fraud until September 28, 1953, since that assertion is no answer or excuse for having waited too long after the effective date to commence his action.

Appellant respectfully submits that for the foregoing reasons the District Court should have dismissed the action as barred by limitation, and it was clearly erroneous for it not to have done so.

III.

The Failure of the District Court to Find and Conclude That Appellee, by Virtue of a Release or License, Was Estopped to Maintain the Asserted Cause of Action Was Clearly Erroneous.

The release or license upon which Appellant claims that Appellee was estopped to maintain the asserted cause of action is to be found in Plaintiff's Exhibit 12, and for the Court's convenience that exhibit has been reproduced in the transcript (TR. Vol. III, p. 719-720).

The release was personally authored by Appellee (TR. 132). The release is clear and unequivocal in the following language selected by Appellee:

"This letter will constitute release of the design to you to market as you see fit."

It was a complete "go-ahead" to Appellant to embark upon a program of commercialization of the subject dipsticks. That is precisely what the Appellant did in obvious reliance upon the document.

It is of the utmost significance that this release was prepared by Appellee at a time when he knew that, under Pan-American policy, Pan-American owned any asserted inva-

ion in the subject dipstick to the extent of Appellee's participation in the conception and making of it, and knew that Pan-American would continue to own it until Appellee opportuned it to grant a release of it, such as the one he obtained some six years later (Defendant's Exhibit A).

While the reason for granting the release is believed wholly immaterial to any issue of this controversy, it has been asserted by Appellee that Appellant asked for the release and obtained it upon Pan-American's belief that it would get a price consideration. Assuming that to be true, for purposes of argument, it offers no excuse whatsoever for the complete failure of Appellee to separately claim a personal interest or right or to make a reservation with respect to any claim of inventorship or ownership that he had at the time of personally authoring the release. If Appellee in fact "had no intention of dealing or conveying any possible rights" that he may have himself had, as he testified (TR. 137), it was his duty to *at that time* reserve those personal rights by language inserted in the release or set up in some separate paper delivered to Appellant.

The fact that Appellee kept his claim in "moth balls" for substantially seven years after participating in the giving of a go-ahead signal, knowing all the while that Appellee was proceeding in reliance on the release and building up a commercial enterprise in the making and selling of the dipsticks in question, makes out an unusually strong case of stoppel. It was grossly inequitable to permit Appellee, on any theory, to disturb a situation that he and his employer helped to create.

For these reasons it is urged that Grindle was estopped to maintain the action and it was error for the District Court not to have dismissed it for that reason.

The Adjudication That Appellant Was Not the True Inventor of the Subject Device Was Clearly Erroneous

The District Court's error in adjudging that Welch was not the true inventor of the subject matter of the patent suit stems from the failure of the Court to appreciate the differences between the Grindle concept and the Welch invention. Those differences are spelled out in the record in the following manner.

Grindle was, by his employer, Pan-American, assigned the problem of designing a better dipstick to replace the wooden and metal devices then in use. He made a series of experiments that led to the *concept* that one might make a satisfactory dipstick by extruding a tubular plastic member with walls of sufficient thickness to permit fluid measuring columns to be defined in each of its four walls, with the tubular plastic member serving as a housing or sheath for a wooden core stick around which there was to be wrapped a paper printed graduation scale. This concept is illustrated in the drawing A-14.123.116, dated April 28, 1948 (Plaintiff's Ex. 6). That idea was arrived at after Grindle had experimented with laminated devices wherein the structure had been built up from a number of pieces (See: Plaintiff's Exhibit 4a sketch made during trial, and Plaintiff's Exhibit 5, a mock-up replica made for purposes of trial). He realized that to "produce a thing of this kind in the laminated form would be very costly and very time consuming, and an extruding process is much more adapted to production methods" (Tr. 87-99).

This was the Grindle *concept* and the closest he came to the subject matter of the patent in suit. This *concept* is not only different from that embodied in the patented structure,

ut it belies his claim of being the "designer" of the Welch patented dipstick (as asserted orally and in the words fixed to Plaintiff's Exhibit 8, drawing No. D-32.061.114) when that claim is viewed in the light of the surrounding facts.

Having arrived at the belief that an embodiment of his concept could be *extruded*, Grindle's next step was to seek out a plastic extrusion manufacturer to get a quotation. Inquiry led to a visit to American Molding Company, accompanied by another Pan-American employee (Marshall Seagrave). The several versions of what transpired during his visit are not in total agreement (Cf. Grindle TR. 100-102; Seagrave TR. 638-643 and Robb TR. 666-670) as to just what was wanted and what was exhibited, but it was agreed that Mr. Robb, of American Molding Company, referred Grindle to Appellant as a possible source of what he was seeking in the way of an extrusion.

The conceived *extrusion* device (Plaintiff's Exhibit 6, a drawing) then constituted the extent of Grindle's mental efforts in the field of dipsticks. A comparison of that idea with the subject matter of the Letters Patent in suit reveals differences so substantial as to negative the Appellee's contention, and show the lack of foundation for the District court's ruling, that Grindle and not Welch was the inventor of the subject matter of the patent. This analysis can best be made by comparative reference to the elements of the claims of the patent in suit and the Grindle concept as evidenced by Plaintiff's Exhibits 5 and 6, even though there is serious doubt that the sample device, of which Plaintiff's Exhibit 6 is said to be a *replica*, was sealed off at its ends with plugs. Cf. testimony of Kerr (TR. 378) disputing the presence of any plugs in the sample that he saw.)

CLAIM 1

	The Grindle Concept
A liquid measuring gauge comprising	
a tubular body of transparent material	Yes
a reinforcing bar within said body and	Yes
having grooves therein and	No
graduated scales on opposite sides of said grooves ;	No
transparent measuring tubes within said grooves	No
with their opposite ends extending beyond the length of the body ; and	No
plugs in the opposite ends of and hermetically sealing the ends of said body against the entrance of liquid within said body surrounding said measuring tubes.	Yes*-N

*If we assume that plugs were present in the sample, an assertion which Kerr disputes.

Summary:

The Grindle reinforcing bar did not have grooves ; it was rectangular in cross-section and the "graduated scale" were wrapped around it or applied to its surfaces.

The "measuring columns" of the dipstick of the Grindle concept were formed in the walls of the tubular body, there being one in each side wall. Hence, there were no tubes that could be within the grooves. Moreover, the Grindle columns terminated flush with the ends of the tubular body within which they were formed and could not, therefore, extend beyond the length of the body as defined in Claim 1.

CLAIM 2

	The Grindle Concept
liquid measuring gauge comprising	
a tubular body of transparent material;	Yes
a reinforcing bar within said body and	Yes
having grooves therein;	No
transparent measuring tubes within said grooves	No
with their opposite ends extending beyond the length of said body; and	No
laminated plugs hermetically sealing the opposite ends of said body and	No
consisting of superimposed layers of sheet material fitting the contours of said ends	No
with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against the ends of said reinforcing bar	No

Summary:

The subject matter defined in Claim 2 differs from that of the Grindle concept for the reasons given with respect to Claim 1.

In addition, it should be noted that the concept of utilizing laminated plugs, having the characteristics set forth above, is wholly foreign to the structure envisaged by Grindle.

CLAIM 3

	The Grindle Concept
A liquid measuring gauge comprising	
a square tubular body of transparent material ;	Yes
a reinforcing bar snugly fitting within said body	Yes
with its opposite ends spaced back from the opposite ends of said body respectively and	Yes*
having longitudinal grooves in two of its opposed corners ;	No
transparent measuring tubes within said grooves respectively	No
with their opposite ends extending beyond the length of said body ;	No
laminated plugs hermetically sealing the opposite ends of said body and	No
consisting of superimposed layers of sheet material fitting the contours of said ends	No
with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against the ends of said reinforcing bar ; and	No
nails extending through the said plugs in the opposite ends of said body and penetrating the ends of said reinforcing bar and	No
having heads bearing against said plugs for compressing said plugs when said nails are driven into the opposite ends of said bar respectively.	No

*If we assume that plugs were present in the sample, an assertion which Kerr disputes.

Summary:

The tally on Claim 3 pronounces even greater differences between the patented structure and that of the Grindle concept.

cept than with the other claims, as inspection will reveal. The addition of the nail was pooh-poohed by Grindle as unsafe, despite the fact that all-metal sticks had been universally used and without seeming consciousness of the fact that non-ferrous or low-conductivity nails are commonplace.

The inescapable conclusion to be drawn from the preceding analyses of the claims is that even if it be assumed that Grindle made an "invention", the Welch patent claims do not follow the Grindle concept.

The Welch patent claims are limited to the specific structure disclosed in the Welch application and were found allowable by the Patent Office upon search and due examination. As yet the Grindle concept has not been so tested and hence maintains its status as a mere "idea" abandoned long since by its creator.

It is apparent that Appellee has confused "inspiration" with "invention", in that he appears to believe that merely because he informed Welch that there was a problem and disclosed to him an impracticable device (namely, the exclusion drawing (Plaintiff's Exhibit 6) conceived in the effort to solve it) that he has just claim to all subsequent inventions and developments relating to solutions of that problem as being derivative.

But the simple answer is that this, at best, would be mere "inspiration", and "inspiration" and "invention" are not synonymous. It is for this reason that mere ideas are never patentable. In the case of *Dyer v. Sound Studios of New York, Inc.*, 85 F.(2d) 431, 432 (C.A. 3; 1936), it was held that:

"It is horn-book patent law that a patentee cannot claim a general idea such as, for instance, the making of long-time running disk records; but his invention, if invention it be, consists in the means he discloses and

embodies in his claim to accomplish such long-time work of the disk."

Being thus shorn of all rightful claim that the dipstick forming the subject matter of the Welch patent was invented by him, it is only natural that Appellee should next turn to the tactic of collateral attack on the validity of the patent by attempting to prove that Welch did not invent the device. Appellee should have failed on that score also.

There is no doubt whatever but that Welch sought the aid and assistance of others, such as Kerr, Rollins and Klein, in the development of the invention forming the subject matter of the patent in suit. That is the common thread of the testimony and the documentary evidence of record. What if he did get the concept of cutting away the wooden stick to accommodate stock tubes in a stock outer plastic shell from Kerr? That is not the claimed combination! What if he did get a suggestion from Klein that the cuts in the stick should be radius cuts to nicely accommodate the tubes? That is not the patented invention! What if he did get a suggestion from Rollins about lamination of the end plug? That is not the patented combination!

This is but evidence of the inquisitiveness for data, the collection of which frequently produces the solution to the problem and, hence, invention. It results in the merging of collected suggestions into the "tout ensemble", and this is the very combination that is claimed.

If along the way the patentee has neglected to credit or with inventive contribution of the order that should have caused him to be included or named as a joint inventor, the statute plainly makes provision for such a contingency. See Title 35, Sec. 256:

"Whenever a patent is issued and it appears that a person was a joint inventor, but was omitted by error

and without deceptive intention on his part, the Commissioner may, on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate adding his name to the patent as a joint inventor.

The misjoinder or nonjoinder of joint inventors shall not invalidate a patent, if such error can be corrected as provided in this section. The court before which such matter is called in question may order correction of the patent on notice and hearing of all parties concerned and the Commissioner shall issue a certificate accordingly." (Emphasis supplied.)

From the foregoing it will be readily seen that there is no real merit to Appellee's blunderbuss attack on the Welch patent and the same should have been rejected by the District Court.

To summarize this point, Grindle had a *concept* of an impractical extrusion device and Welch disclosed to him a practical device. Those two devices were distinctly different, as we have demonstrated. Thus on the record it was error for the District Court to conclude, expressly or by implication, that Grindle conceived both the impractical extrusion device and the practical device of the patent.

We are left to deal only with Plaintiff's Exhibit 8, Pan-american drawing D-32.061.114, which, on its face, credits Grindle with the design of the structure shown. The plain facts are that Grindle did *not* instruct Chong, the Pan-american draftsman, on the make-up of the drawing until after Welch had called on Grindle to report his findings with respect to the impractical extrusion device and disclosed to him the practical device (TR. 104-109). Grindle testified that Welch, on the occasion of that visit, merely handed him three (3) pieces of standard extruded tubing and inquired whether he could use them without explaining

how they were to be used (TR. 107). Welch testified that on May 14, 1948, he delivered an assembled Dipstick to Grindle and left it with him. Since Kerr, upon concluding that Grindle's extrusion device was impractical (TR. 380) had made up a partly assembled stick (illustrated by Defendant's Exhibit H) and sent it to Welch with his advice (TR. 387), it is illogical to assume that Welch discarded the Kerr sample and presented Grindle with less, e.g., unassembled standard plastic extruded tubes.

For these reasons we submit that the Welch version of what he disclosed to Grindle is the more convincing and reliable. But in any event, Grindle did not and, presumably, could not instruct the draftsman until *after* he had seen Welch, and the drawing (Plaintiff's Exhibit 8) reflects technical knowledge imparted to him by Welch.

V.

The Holding That the Patented Dipstick Had Been in Prior Public Use or Sale and the Refusal to Reopen the Case for Further Evidence on That Point Was Clearly Erroneous.

For purposes of clarity Appellant will here couple the discussion of Points 6 and 7 of his Statement of Points (TR. 14), as they are interrelated.

Elsewhere in this brief Appellant has pointed out that Claims 2 and 3 of his patent distinguish, in a patentable sense, from the subject matter of Claim 1 and there will be no need to repeat the discussion here beyond saying that it is important to bear the distinctions in mind, as the evidence concerning asserted prior public use or sale related only to the subject matter of Claim 1.

Mr. Welch, speaking of his search for evidence bearing on the earliest production of the Dipsticks of the patent, testified that the production of the "laminated ones" commenced in

the latter part of October or the first part of November, 1948 (TR. 499). Since he was there talking about first production of the dipsticks with the laminated plug type of end closure, embodiments of the subject matter of Claim 2 were unmistakably pointed to.

The Welch application was filed on August 17, 1949 and therefore the critical one year period commenced to run on August 17, 1948. Production and sale of the devices called for in Claim 2 in October or November, 1948, or within the one year period, would not invalidate the patent as to Claims 1 or 3. Consequently, it was clearly erroneous for the District Court to make a blanket finding covering all claims of the patent when the evidence, such as it was, went only to the subject matter of Claim 1.

Coming now to the question of prior public use of the specific subject matter of Claim 1 of the Welch patent, the record is clear that, acting upon the strength of his findings of the microfilmed records of Pan-American, purporting to show a partial shipment of 54 devices on August 12, 1948, Welch entered a disclaimer to Claim 1 of his patent (TR. 46-498; Defendant's Exhibits I-1 and J-1; TR. Vol. III, p. 717).

During and after trial Appellant continued his search for information bearing on the true date of first sale or delivery of the dipsticks of Claim 1 and, upon his findings, moved to reopen the case to take further evidence on the question and for an order revoking his voluntary disclaimer of the subject matter of Claim 1. The motion is set forth at TR. 2; the supporting affidavit of Welch at TR. 25; and the supporting affidavit of Francis J. Burke at TR. 32; and the court's attention is respectfully directed thereto, along with the exhibits that accompanied these papers. There is no need to detail the showing that was made in support of the motion

since the moving papers speak plainly enough to indicate that sufficient doubt was established concerning the reliability of the trial evidence to have warranted a reopening of the case for the taking of further evidence.

This Court has heretofore expressed views consonant with any reasonable request for the fullest hearing on the issue of prior public use. See: *Whiteman v. Mathers*, 23 F.(2d) 712, 104 U.S.P.Q. 83, 86, wherein it was observed:

“The burden of proof imposed upon a party tendering the issue of prior public use is a heavy one. It is not satisfied by a mere preponderance of the evidence, but is borne successfully only if the evidence is clear and satisfactory—perhaps beyond a reasonable doubt”.

It is therefore believed and contended that it was clearly erroneous for the District Court to content itself with the trial evidence impugning the validity of Claim 1 and to refuse to reopen the case for receipt of evidence throwing further light on the question.

VI.

The Treatment of the Pan-American Drawing as a "Prior Publication" Was Clearly Erroneous

The District Court concluded (Conclusion No. 7, TR. 71) that the patent in suit was void “because the dipstick disclosed in the patent was *published* in drawing D-32.061.114 more than one year before the patent application was filed”. The only finding resembling support for this conclusion is Finding No. 32 (TR. 70) that “Claim 1 of the patent reads directly on the dipstick disclosed in plaintiff’s drawing D-32.061.114 *published* on June 10, 1948”.

This ruling is the result of the failure to appreciate the plain meaning of the words “printed publication” as they are used in the patent statute (35 U.S.C. 102 (a) and (1)).

Prints of drawings handed by Grindle to Welch were not "printed publications" in the statutory sense, because there was absent "publication" of the kind and to the extent necessary to spell out *general circulation* of the print. The drawing was *privately* distributed by Pan-American in furtherance of its interests, to wit, the procurement of Dipsticks pursuant to its order to Welch and the grant of the release which it accompanied. As of its date (June 10, 1948) the devices it portrayed had not been manufactured and were not made until sometime later.

When the cases collected at *Walker on Patents* (Deller Edition) p. 266 et seq.; 1955 Supp. p. 101, et seq., are examined it will be noted that the turning point is short of drawings of the type here under consideration. The closest they come to a holding that a drawing can constitute a "printed publication" is to be noted in two cases.

The case of *Bishop & Babcock Mfg. Co. v. Western Auto Supply Co.*, 105 F.(2d) 886, 42 U.S.P.Q. 293, 295, flatly states that unpublished drawings do *not* in and of themselves constitute evidence of anticipation. It then goes on to say they only have such value when coupled with devices shipped in commerce, a consideration not to be found in the holding here under attack.

At first blush, *Des Rosiers v. Ford*, 143 F.(2d) 907, 62 U.S.P.Q. 320, would seem to stand for the proposition that a drawing, *per se*, is a "printed publication", but examination reveals that the drawing was *a part of a printed domestic periodical* and hence it was the latter that met the statutory definition.

Clearly then, the Pan-American drawing was given a significance it did not deserve.

VII.

The Finding of the District Court That the Welch Patent Did Not Define Invention Over the Prior Art Was Clearly Erroneous

In approaching this aspect of the case there are a number of considerations that should be borne in mind.

In the first place, Appellant will concede that the invention forming the subject matter of the Welch patent was not one of earth-shaking proportions. Indeed it will be conceded that the invention was a simple one, because that characteristic is not fatal. This Court said in *Patterson-Ballantyne Corporation et al. v. Perry M. Moss et ux*, 201 F.(2d) 40, 96 U.S.P.Q. 206, 208 that:

"It is quite apparent that simplicity alone will not preclude invention."

Another factor that is to be taken into account is that the devices embodying the subject matter of the Welch patent have gone into extensive use, supplanting various metal and wooden devices that were in vogue at the time of its introduction (See: Defendant's Exhibits K-1 to O-1, inclusive a collection of various types of dipsticks).

Another consideration worth noting is the fact that the Appellee, himself, conceded that the Welch dipstick device is highly efficacious for its purpose. Grindle testified as follows (TR. 158-9):

"Q. Does Pan-American still use the dipsticks supplied by Mr. Welch?

A. Yes, they do. *The dipstick is still a good, functional device. To date I haven't seen anything better.*" (Emphasis supplied.)

These factors bespeak the presence of invention in the subject matter of the Welch patent. They tell of a problem or need and the filling of that need with a structure which,

while simplicity itself when viewed by way of "knowledge after the event", nevertheless supplanted the earlier devices of its kind.

When considered in this light the invention was not one that should be cast aside lightly as the District Court did by reference to the two prior patents to *Hyde* and *Schmitt*, since there are a number of considerations that rule out those two patents as valid anticipations.

The patents on which the District Court relied were put in evidence by Appellant, Welch, and not the Appellee, Grindle, as would have been normally expected (TR. 672-673). Grindle, it should be noted, studiously avoided making any showing of the state of the art. They were offered by Appellant not to invalidate his own patent, but rather to round out or augment the showing of the state of the art, partly illustrated by the physical exhibits of dipsticks commonly in use at the advent of the Welch device (Defendant's Exhibits K-1 through O-1). Furthermore, the patents of *Hyde* and *Schmitt* were not cited by the Patent Office in its consideration of the Welch application, since the patent at its very end (TR. Vol. III, p. 718) carries the endorsement: "No references cited".

It is appreciated that this and other Courts have been prone, under some circumstances, to treat the absence of references or the failure to cite particular patents as an indication that the Patent Office examination was deficient and that the presumption of validity was thereby overcome, but it is respectfully submitted that in the case of a patent based upon very specific or limited claims, as here, the citation "No references cited" may very well signify that no references were considered and discarded as lacking any degree of anticipatory value. So here, considering the relative simplicity of the devices in the art and the absence of

any complexities in classification of the prior art for search purposes, it is entirely reasonable to assume that the Patent Office Examiner saw the patents to Hyde and Schmitt but did not regard them as being of sufficient pertinency to anticipate the claims of the Welch application. This belief is borne out when the elements of the Welch claims are set in apposition to the Hyde and Schmitt patent disclosures as follows:

WELCH CLAIM

	HYDE (Tr. Vol. III, p. 721)	SCHMITT (Tr. Vol. p. 724)
A liquid measuring gauge comprising		
a tubular body of transparent material	No	No
a reinforcing bar within said body and	No	No
having grooves therein and	No	No
graduated scales on opposite sides of		
said grooves;	No	No
transparent measuring tubes within said		
grooves	No	No
with their opposite ends extending		
beyond the length of the body; and	No	No
plugs in the opposite ends of and hermeti-		
cally sealing the ends of said body against		
the entrance of liquid within said body		
surrounding said measuring tubes.	No	No

Summary:

It will be seen from the foregoing tabulation that no specific combination of elements claimed, in the particular arrangement and association of parts, is not found in either of the patents to Hyde and Schmitt.

True, some of the elements are common to the several devices, such as the transparent open ended tube A of Hyde, and tube 11 of Schmitt and the supporting rods and graduated scales of both of the patented structures, but neither

Hyde nor Schmitt devised the particular combination called for in Welch claim 1. The same is true of Welch claims 2 and 3.

The invention of the Welch patent, it is respectfully submitted, was made up of a combination of elements, in a manner which was sufficiently new and novel to measure up to the accepted standards of invention. It was a new combination of elements in particular arrangement and association of parts to produce, as Appellee Grindle testified, "a good, functional device", and hence it exceeded the mere value of the sum of its parts.

This Court, under similar circumstances, has said that a finding which picks out one element from one prior patent and another element in another prior patent as a demonstration of anticipation is clearly erroneous. See: *Ry-Lock Co., Ltd. v. Sears, Roebuck & Co.*, 227 F.(2d) 615, 107 U.S. 1Q. 292, 294 (cert. den. 108 U.S.P.Q. 456), wherein this declaration of principle appears:

"Hence, a finding which, as here, picks out one element in one prior patent and another element in another prior patent as a demonstration of anticipation, is manifestly insufficient to overcome the presumption arising from the issuance of the patent, a presumption reemphasized by the existing Act. 35 U.S.C.A. § 282."

WELCH CLAIM 2

	HYDE (Tr. Vol. III, p. 721)	SCHMITT (Tr. Vol. III, p. 724)
Liquid measuring gauge comprising		
a tubular body of transparent material;	No	No
a reinforcing bar within said body and	No	No
having grooves therein;	No	No
transparent measuring tubes within said		
grooves	No	No
with their opposite ends extending		
beyond the length of said body; and	No	No

	HYDE (Tr. Vol. III, p. 721)	SCHMITT, (Tr. Vol. II p. 724)
laminated plugs hermetically sealing the opposite ends of said body and	No	No
consisting of superimposed layers of sheet material fitting the contours of said ends	No	No
with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against the ends of said re- inforcing bar.	No	No

Summary:

Claim 2 distinguishes over Claim 1 specifically in the use of superimposed layers of sheet material with adhesive cement interposed between the layers to form laminated plugs instead of the one-piece or solid plugs used as end closures in the device of Claim 1. The pieces making up the laminated plugs were shown as Defendant's Exhibits, J, V and W. There was a reason for this development. Welch explained that solid plugs made up of cement were not satisfactory in that when the cement plug hardened and dried it resulted in distortion of the ends of the dipstick. Some of the devices so made leaked and they were not successful in getting a good bond. Plaintiff's Exhibit 18 was identified as an example of a Dipstick so made with distortion at its ends (TR. 467-470, 473-477). Rollins, and others, had tried to help Welch make a satisfactory solid plug but without success (TR. 294-297).

Manifestly, the discovery that laminated plugs would solve the problem was *not* a change of the "sort which any mechanic in or out of the plastic field *might* have devised in the course of construction", as the District Court found (TR. 70, Finding 34). This variation was one discovered

fter painstaking work and represented a substantial improvement over the structure of Welch Claim 1.

WELCH CLAIM 3

	HYDE (Tr. Vol. III, p. 721)	SCHMITT (Tr. Vol. III, p. 724)
liquid measuring gauge comprising		
a square tubular body of transparent material;	No	No
a reinforcing bar snugly fitting within said body	No	No
with its opposite ends spaced back from the opposite ends of said body respectively and	No	No
having longitudinal grooves in two of its opposed corners;	No	No
transparent measuring tubes within said grooves respectively	No	No
with their opposite ends extending beyond the length of said body;	No	No
laminated plugs hermetically sealing the opposite ends of said body and	No	No
consisting of superimposed layers of sheet material fitting the contours of said ends	No	No
with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against the ends of said reinforcing bar; and	No	No
nails extending through the said plugs in the opposite ends of said body and penetrating the ends of said reinforcing bar and	No	No
having heads bearing against said plugs for compressing said plugs when said nails are driven into the opposite ends of said bar respectively.	No	No

Summary:

Claim 3 distinguishes over Claim 1 in the same respect as Claim 2 and additionally distinguishes over Claim 2 in the detail of using a nail 24 (See: TR. Vol. III, p. 717, Fig. 1 and 3) to compress the laminated plugs and force the cement outwardly against the inner surfaces of the body ends and around the tubes 9, 10 and into the intervening interstices.

For the reasons given with respect to Claim 1, it is clear that the patents to Hyde and Schmitt do not anticipate the subject matter of Claim 3.

True enough, the differences between the Welch patent and the disclosures of Hyde and Schmitt are slight when scrutinized in the foregoing manner, but they nevertheless represent an advance in the art and contributed to the make-up of a Dipstick that was far superior to those in use at the time of its introduction and one that filled a need. It is not without significance, of course, that manufacturers in the art had not seen fit to draw on the teachings of either Hyde or Schmitt in making up the Dipsticks that preceded the Welch stick (Defendant's Exhibits K-1 through O-1). It is urged that this may be regarded as silent testimony that the Hyde and Schmitt teachings were inadequate for the purpose.

Under the circumstances enumerated in the record it is respectfully submitted that the findings (Nos. 33-35; TR. 70) upon which the holding of want of invention was based were clearly erroneous.

VIII.

Appellee Was Guilty of Laches and Acquiescence with Respect to Appellant's Manufacture and Sale of the Subject Devices and the Action Should Have Been Dismissed for Those Reasons.

Elsewhere in this brief (Point III) we have discussed the circumstances that created an estoppel against Appellee's

aintenance of this action. The course of Appellee's conduct herein spelled out shows that he was also guilty of laches and had acquiesced in Appellant's manufacture and sale of the devices in a manner and to such a degree that these equitable defenses should likewise have been invoked and the action dismissed.

There should be no encouragement given to one who is willing to shut his eyes to that which is obvious to all around him and then rush in, when it suits his fancy and convenience, to assert a claim many years after the event. This is especially true of one in Appellee's position, appearing first as one in aid of the establishment of this part of Appellant's business to the extent of authoring a release, and next as a friend of the Appellant. Appellee's complete indifference to a chain of events unfolding before his very eyes, and over a period of time, exceeding the period of the applicable Statute of Limitations, cannot be ignored or condoned.

IX.

Appellee's Prosecution of His Stale Claim Gave Rise to Circumstances Meriting an Award of Attorney's Fees to Appellant.

This Court has declared that an award of attorney's fees pursuant to 35 U.S.C. 285 should be made only in extraordinary circumstances (Cf. *Park-In Theatres, Inc. v. Perma-Film, Inc.*, 190 F.(2d) 137, 90 U.S.P.Q. 163). It is urged that Appellee's conduct in the institution and prosecution of this action to further an obviously stale claim, was vexatious and unjustified and warrants an award of attorney's fees to Appellant. Appellee's laches and acquiescence, as well as the facts giving rise to an estoppel against him, have been discussed elsewhere in this brief and need not be repeated here. It is respectfully submitted that, upon reversal and remand, this Court should direct the District Court to

award a reasonable attorney's fee and thus place that burden where it rightfully belongs.

X.

The District Court's Order Requiring Appellant to Discontinue the Patent Marking of the Devices and to Notify Customers Was Also Improper.

There are several underlying considerations that indicate the impropriety of the order of the District Court that Appellant discontinue marking his devices with the number of his patent and notify customers that the subject devices were not patented.

First, as we have shown elsewhere in this brief, the subject matter of Claims 2 and 3 of the Welch patent are not clearly non-inventive over the prior art. Additionally, the subject matter of Claim 1 should not be thrown into the public domain until all pertinent facets of proof concerning asserted prior public use have been observed, as offered by Appellant's motion to reopen the case.

Secondly, the decision here is binding only as between the parties, which means that the patent or some of its claims may be deemed valid in other jurisdictions.

Thirdly, no such equitable considerations surround Appellee as would command a clearing of the path for establishment of his own enterprise in Dipsticks, it being shown that he has only a "desire" to go in that direction.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded with directions to find the patent valid and Appellant restored to an unfettered enjoyment of the rights that flow from it. Such disposition of the case should

be accompanied by an award of a reasonable attorney's fee
to make Appellant whole in the matter of resisting an obvi-
ously stale claim.

Respectfully submitted,

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No. 15,540

IN THE

United States Court of Appeals
For the Ninth Circuit

C. MARTIN WELCH,

Appellant,

VS.

EUGENE L. GRINDLE,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

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No. 15,540

IN THE

**United States Court of Appeals
For the Ninth Circuit**

J. MARTIN WELCH,

Appellant,

VS.

EUGENE L. GRINDLE,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

I. OPENING STATEMENT.

This Brief on behalf of Appellee, Eugene L. Grindle, hereinafter called "Appellee" or "Grindle," is in response to the Appellant's Opening Brief. Appellant, Welch, has appealed from a Judgment and Decree (TR. 73) of the United States District Court, Northern District of California, Southern Division, adjudging Welch patent No. 2,534,644 as being void and invalid as to all three of its claims on four separate and independent grounds (TR. 71) which are stated below:

1. Patent No. 2,534,644 is void because the application was not filed by the true inventor.

2. Patent No. 2,534,644 is void because the dipstick disclosed in the patent was in public

use for more than one year before the application was filed.

3. Patent No. 2,534,644 is void because the dipstick disclosed in the patent was published in drawing D-32.061.114 more than one year before the patent application was filed.

4. Each of the three claims of the patent No. 2,534,644 is invalid because it fails to define invention over the prior art, particularly Hyde and Schmitt.

The Judgment and Decree also enjoined and directed that the Appellant, Welch inform each and every of his past purchasers of the dipsticks and others that the dipsticks were not patented; enjoined and directed him to inform said past purchasers by a written notice first submitted to the Court for approval, together with a list of said past purchasers; permanently enjoined him from marking any dipsticks or selling any dipsticks already so marked with any notation of a patent number or the pendency of a patent and decreeing that each party bear its own costs. The Appellee also appealed from the final Judgment and Decree which was subsequently dismissed upon Stipulation and Order (TR. 711).

II. STATEMENT OF FACTS.

A. IN GENERAL.

The cursory statement of the case given by the Appellant is so short and omits so many facts that

we believe it is necessary to set forth the pertinent facts so that the case can be viewed in the proper perspective.

THE BASIC EMBODIMENT OF THE DIPSTICK DISCLOSED IN WELCH PATENT NO. 2,534,644 WAS CONCEIVED AND DEVELOPED BY THE APPELLEE, GRINDLE, AND DISCLOSED TO THE APPELLANT, WELCH.

Initial development of the new type dipstick.

Because of the difficulty Pan American World Airways, hereinafter called "Pan American" was having with the wooden dipsticks it was using, Pan American, early in 1948, assigned to Appellee, Grindle, an engineer in its Engineering Department, the project of developing a new type dipstick (TR. 87). The wooden dipsticks were objectionable because chips came off the sticks and clogged the valves of the carburetors in the airplanes. The wooden dipsticks were also objectionable because they were often calibrated inaccurately and were easily broken (TR. 87). The project of developing the new type dipstick was assigned to Grindle because he was a highly qualified mechanical engineer with many years of practical experience as a design engineer (TR. 82-86).

Grindle, after considerable experimentation and development, arrived at what he believed would make a satisfactory dipstick. In the beginning of the development Grindle decided to utilize plastic to eliminate the breakage and chipping problem. After making several dipsticks from plastic material he

formulated the idea of providing a bore in the dipstick and raising a column of gasoline from a tank by placing a finger over the upper end of the bore and then making a reading on a scale on the dipstick. Grindle, by experimentation found that the specific gravity of aviation gasoline was such that a fluid column of over $3/16''$ in diameter could not be lifted in this manner. A dipstick utilizing these principles was fabricated and consisted of a $3/4'' \times 3/4''$ plastic extrusion through which a bore $3/16''$ in diameter extended longitudinally. Calibrations were impressed on the outer surfaces of the extrusion (TR. 89). The dipstick thus constructed was tested and found to operate satisfactorily and was introduced in evidence as Plaintiff's Exhibit 3 (TR. 90). However, Grindle was not satisfied with this dipstick because he thought it might be too expensive to manufacture and also because he had other ideas for improving the dipstick (TR. 91).

Grindle's next development consisted of making up a $3/8''$ square wooden filler 3 feet in length upon which he cemented an Ozalid print bearing the proper calibrations. The wood filler was then taken to the plastic shop at Pan American and given to a Mr. Herbert Montoya, hereinafter referred to as "Montoya," who was instructed to enclose the assembly in plastic and to provide holes in the plastic for lifting fluid columns. Grindle first instructed Montoya to make the holes for the fluid columns at the corners of the dipstick so that it would not be necessary to look through the fluid columns to read the

scale (TR. 91). Montoya fabricated a dipstick in accordance with Grindle's instructions from narrow strips of plastic which had been cut from sheets of 1/16" thickness and bonded together around the filler given to him by Grindle. The ends were sealed with plastic pieces also cemented in place to protect the Ozalid scale from wetting (TR. 93, corroborated by Montoya TR. 266). Both Grindle and Montoya made sketches of this dipstick as they remembered it and they were introduced in evidence as Plaintiff's Exhibits 4 and 25, respectively (TR. 4 and TR. 267).

With the holes for the fluid columns in the corners of the dipstick, Montoya found he had difficulty in sealing the corners to prevent leaking (TR. 94, corroborated by Montoya TR. 266.) Grindle then suggested moving the fluid columns to the center of each side of the dipstick and Montoya then constructed another dipstick from similar plastic strips. This dipstick was tested and found to operate satisfactorily (TR. 94, corroborated by Montoya TR. 267). This dipstick was not available for introduction into evidence because it had been lost or destroyed while in the possession of the Plastic Process Company (TR. 98). Therefore, before trial, Grindle had made, under his direction, a replica of this dipstick which was introduced in evidence as the Plaintiff's Exhibit 5. This replica or mock-up was fabricated in a manner exactly the same as the original (TR. 95, corroborated by Montoya TR. 268, also corroborated by Seagrave TR. 641).

2. Grindle disclosed the dipstick he had developed to the Appellant, Welch.

After a satisfactory dipstick was completed by Montoya in accordance with Grindle's instructions, Grindle prepared a drawing of a proposed extrusion for the plastic portion of the dipstick (TR. 98), a Ozalid copy of which was introduced in evidence as Plaintiff's Exhibit 6 and bears drawing No. A-14 123.116 and a date of April 28, 1948 (TR. 98-99). The drawing shows a $\frac{3}{4}'' \times \frac{3}{4}''$ square plastic extrusion 144'' in length. A hole extending longitudinally of the extrusion is shown in each of the four sides of the extrusion. The extrusion also is provided with a centrally located $\frac{3}{8}'' \times \frac{3}{8}''$ square hole which is adapted to receive the wood filler upon which the calibrated scale is mounted.

Grindle prepared the extrusion drawing so that he could submit it to vendors to obtain quotations on the extrusion only. At that time, Pan American was planning to make the dipsticks in their shop and for that reason Grindle did not show the other components of the dipsticks in the drawing (TR. 99).

After Grindle had completed the extrusion drawing, he consulted the classified section of the telephone directory to determine where the plastic extrusion manufacturers in San Francisco were located (TR. 100). It was Grindle's practice, as well as that of other engineers, as soon as something new had been designed in a specialized field, to consult with the manufacturers to obtain suggestions for adapting the design to the most economical production methods (TR. 99).

Grindle, accompanied by Marshall T. Seagrave, hereinafter called Seagrave, called on the American Molding Co. in San Francisco and spoke to a Mr. John G. Robb, hereinafter called "Robb." Grindle discussed with Robb the possibility of obtaining the proposed extrusion from American Molding and showed him the model plastic dipstick which had been fabricated by Montoya and a copy of the extrusion drawing (TR. 101, corroborated by Seagrave TR. 642). American Molding was not interested in supplying the extrusion because of the small quantity desired by Pan American and suggested that a Mr. Martin Welch, the Appellant, who represented the Plastic Process Company of Los Angeles, might be interested (TR. 101, corroborated by Seagrave TR. 642).

Grindle recalled that his visit to American Molding Co. must have occurred two or three days after the completion of the extrusion drawing, on April 8, 1948 (TR. 102). Seagrave was able to corroborate the fact that the visit to American Molding occurred sometime the first part of May, 1948 (TR. 39).

Grindle did not call on Welch on the same day because Seagrave had to complete some business of his own. Grindle called Welch the same afternoon of their return or the day thereafter (TR. 102) and informed Welch that Pan American had a plastic extrusion job on which he would like to have him quote. Welch informed Grindle that he was in Millbrae and would be glad to drop in to see Grindle at his office at Pan American.

Welch called on Grindle at Grindle's office at Pan American on the day after Grindle's call (TR. 102). During the conference between Grindle and Welch Grindle discussed the evolution and development of the dipstick and showed him the various sample he had made, and showed him the dipstick fabricated by Montoya. During the conversation Grindle gave Welch a copy of the extrusion drawing No. A-14.123.11 and the mock-up dipstick fabricated by Montoya (TR. 103) which was sent to and received by the Plastic Process Company (see first paragraph of letter dated May 3, 1948—Defendant's Exhibit E). After conclusion of the discussion with Grindle, Welch stated that he would get a reply from his company as soon as possible and took with him a copy of the extrusion drawing (TR. 103).

C. THE STEPS LEADING UP TO THE MANUFACTURE AND SALE OF FUEL TANK DIPSTICKS BY WELCH.

1. Welch's letter of inquiry to the Plastic Process Company.

After seeing Grindle, Welch, on the same day or the day thereafter wrote a letter of inquiry dated May 3, 1948 (Defendant's Exhibit E) to Mr. Harry Wenk of the Plastic Process Company (TR. 41) which read as follows:

"The enclosed drawing is a section of a fuel tank measuring stick, sample of which is being mailed you today by Pan-American.

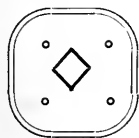
Will you and Ted please get together on this and recommend whatever changes possible to reduce cost and improve efficiency?

You can make any changes necessary, so long as we furnish a section with four holes that can be no larger than $3/16''$ diameter, as that is the largest size tube that 100-octane fuel will stay in, when your thumb closes one end after dipping into tank.

The purpose of the stick, as you can no doubt see, is to stick same into any one of four different size fuel tanks, place your thumb over the hole on one end, and read the amount of fuel in the tank.

You will note on the sample, that there is a wood section, upon which is pasted a graduate paper scale on each of its four sides. Can you think of any substitute section in plastic that can replace the wood? (Maybe a square tube, closed at both ends, or ?)

An alternate design which may work o.k. and save material, such as:



approx. $3/4''$ or less square

would perhaps be better. However, on this shape it may be somewhat difficult to get a correct reading off the scale due to the round corners.

Please let me know as soon as you can, what you'd recommend, in addition to quoting on the sample (prices and delivery).

1000 ft. will be the initial order, so I have warned that the cost would be higher than if 5000 ft. were ordered. One thousand feet would last Pan-Am. several years. It was mentioned that these people would have no objection to us selling other

airlines this fuel gauge, as they are all presently using a metal or wood stick, which is unsatisfactory to the extent that the gasoline evaporates so rapidly that an accurate reading is not always obtained.

We are only to furnish the extrusion, not the paper scale charts or the wood. (Unless, as mentioned above, you can think of something in plastic to replace the wood.)”

The first paragraph of the letter states that the drawing was enclosed with the letter showing a section of a fuel tank dipstick and it is clear that this drawing was the extrusion drawing Welch had received from Grindle (TR. 414). The same paragraph also states that a sample fuel tank measuring stick was being mailed on the same date to Plasti Process Company by Pan American. The sample referred to is the mock-up dipstick fabricated by Montoya.

In the second paragraph of the same letter, Welch asked Mr. Wenk and Mr. Kerr to get together on the fuel tank dipstick and recommend whatever changes possible to reduce the cost and improve the efficiency. From this it is apparent that Grindle informed Welch that the extrusion proposed by Grindle was not final and that he would be amenable to any changes which would reduce the manufacturing cost.

Welch denied seeing the mock-up dipstick fabricated by Montoya (TR. 415). However, the fifth paragraph of the same letter begins with the words “You will note on the sample” which certainly in-

ates that Welch had an opportunity to observe the construction of the mock-up dipstick that was being sent to the Plastic Process Company. The fifth paragraph is very specific and specifies that the mock-up dipstick included a "wood section, upon which is fastened a graduate paper scale on each of its four sides." The letter, in general, gives a very lucid description of the mock-up dipstick which it is submitted would have been difficult to give if Welch had merely seen the extrusion drawing which contained no information about the general construction of the dipstick. This is particularly true since Welch had no previous knowledge or experience in dipsticks (TR. 566).

Welch contends that he was not aware at the end of his initial conference with Grindle that end plugs were required for sealing the ends of the dipstick to prevent wetting of the paper scales (TR. 553). However, in the last sentence of paragraph five of the letter of May 3, 1948, Welch asked Mr. Wenk whether he could think of any substitute section in plastic that could be used to replace the wood filler and then made the suggestion of a square tube closed at both ends. It is submitted that this certainly intimates that Welch knew on May 3, 1948, that the ends of the dipstick had to be sealed to protect the paper scale. Welch admitted on cross-examination that this suggestion could mean the square tube in which a graduated paper scale had been positioned and sealed at both ends to prevent damage to the paper scale (TR. 568).

Welch admitted that in his initial conference with Grindle that Grindle had shown him other sample dipsticks (TR. 410 and 414). It is difficult to believe that Grindle would not have shown the mock-up dipstick fabricated by Montoya to Welch because that was the type of dipstick for which the extrusion was intended. That the mock-up dipstick had been completed by this time is clear because Grindle had the mock-up dipstick with him when he consulted American Molding Co., who referred him to Welch.

2. The quotation by Plastic Process Company.

Mr. Kerr, hereinafter called "Kerr," of the Plastic Process Company, testified that he recalled receiving the letter dated May 3, 1948, the extrusion drawing enclosed with it (TR. 369 and 372) and the mock-up dipstick sent to the Plastic Process Company (TR. 373). Kerr described the mock-up dipstick as he remembered it, as consisting of pieces of sheet stock that had been cemented together to form a square tube, the square tube having four orifices all containing a wooden stick in the center (TR. 374). Kerr also testified that he remembered that the ends of the mock-up dipstick were flush, that is, that the ends of the wood filler were flush with the inner and outer ends of the dipstick (TR. 378) and that it had no end closures (TR. 380). That the mock-up dipstick had no end closures contradicts the testimony of Grindle which was corroborated by the testimony of Montoya (TR. 266) and Seagrave (TR. 641).

This conflict in the testimony is relatively unimportant except for the fact that Welch contended that he did not know that the ends of the dipstick had to be sealed until some time after his initial conference with Grindle. It is submitted that it is far more reasonable to believe that the ends were sealed since a paper scale was pasted on the wood filler. Grindle would have been unable to test the mock-up dipstick without sealing the ends because the paper scales would have been ruined by the gasoline.

Kerr testified that after he had received the mock-up dipstick on May 10, 1948, he simplified the construction by using standard extrusions which the Plastic Process Company was already manufacturing. He made a sample which, with a quotation (Plaintiff's Exhibit 35) dated May 11, 1948, and a letter of explanation dated May 11, 1948 (Defendant's Exhibit I) were sent to Welch. In making up the sample, only two tubes were used because if four tubes had been used, there would have been insufficient area on the wood filler for placement of scales. Each tube, therefore, had to service two scales.

Kerr stated in the letter dated May 11, 1948, that he had simplified the mock-up dipstick supplied by Pan American by proposing the use of standard extrusions because making the die for Grindle's proposed extrusion would be too expensive for the quantity of extrusion desired. Kerr also stated in the letter that he made the wood filler by cutting two square grooves in opposite corners (TR. 385) and

that he had removed a sufficient amount of width to permit $\frac{1}{4}$ " tubes (standard extrusions) to be inserted between the wood filler and the $\frac{3}{4}$ " x $\frac{3}{4}$ " square tubing (another standard extrusion) (TR. 386-387).

The quotation dated May 11, 1948, stated that the Plastic Process Company was willing to quote a price of \$1.79 each for all the components of the dipstick ready for assembly as per the sample submitted by Mr. Kerr without calibrations and to be made of clear Tenite II.

In the letter dated May 11, 1948, Kerr commented on the sample he was sending to Welch and stated that each round tube serviced two scales and that each tube was allowed to extend above the top of the square tubing for ease of operation. From this letter it would appear that the round tubes must have been held firmly in place by the wood filler inserted by Kerr. Otherwise both of the round tubes would not have been held in place to extend above the top of the square tubing. Welch admitted receipt of the letter dated May 11, 1948, and the sample made by Kerr consisting of three assembled pieces of plastic tubing in a wood filler (TR. 422).

3. Grindle's second conference with Welch.

After his initial conference with Welch, Grindle did not hear from Welch until approximately one week later (TR. 104), at which time Welch walked into Grindle's office and stated that he had received a reply from his company (TR. 104). Welch brought with him a piece of $\frac{3}{4}$ " square $1/16$ " wall plastic

tubing and two pieces $\frac{1}{4}$ " outside diameter round tubing, all three pieces being approximately 3 feet in length (TR. 104).

Welch stated that his company had studied the proposed extrusion and said that it would be costly to produce and offered the standard extrusions made by his company as a possible substitute (TR. 105). Welch delivered the square and round tubing in a separate state and the round tubes definitely were not held in place within the square tubing by a wooden roller (TR. 105). Examples of the tubing submitted by Welch to Grindle were placed in evidence as Plaintiff's Exhibits 7A, 7B and 7C. The round tubes submitted by Welch were similar to those that Grindle had drawn out of Pan American stock to check the proper cross-sectional area for aviation gasoline (TR. 106). Grindle had also used solid $\frac{3}{4}$ " square plastic extrusions and had seen square tubular metal extrusions (TR. 106) so that the standard extrusions submitted by Welch certainly were not new.

Welch was able to fix the date of his second visit with Grindle because of a letter he had written on May 14, 1948, to Plastic Process Company (Defendant's Exhibit 0). The letter stated that he was going to see Pan American that afternoon and thanked the Plastic Process Company for the quick service.

There is a direct conflict in the testimony as to exactly what Welch gave to Grindle. Welch testified that after receiving the sample from Kerr that he, together with his neighbor, Mr. Klein, hereinafter

called "Klein," made a new wood filler (TR. 434) for a purpose which is not altogether clear and then submitted the assembly consisting of the $\frac{3}{4}$ " square tubing, the two $\frac{1}{4}$ " round tubes and a wood filler to Grindle (TR. 434).

If we are to assume that Welch's statements are true, the sample which was not mailed from Los Angeles until on or after May 11, 1948, had to be received by Welch in his office in San Francisco by May 13, 1948. He then would have had to take the sample home with him that same evening of the 13th. He and Klein would have had to make up a new filler for the sample dipstick that evening so that he could bring it back to his office in San Francisco the next morning for submission to Grindle that afternoon. It is submitted that it is far more reasonable to believe that Welch did not actually receive the sample dipstick sent by Kerr from Los Angeles until May 14, 1948, and that on the same day of receipt he took the standard plastic extrusions without the wood filler and submitted them to Grindle on his way home to Millbrae.

It is difficult to believe that Welch would have gone to the trouble of making a new filler in view of the fact that the changes, which he claims were made, were very minor. This is particularly true since at this time Welch did not know whether Pan American would allow him to quote on a complete dipstick.

In delivering the standard plastic extrusions to Grindle, Welch failed to deliver the quotation of the Plastic Process Company dated May 11, 1948, which

was addressed to Pan American (TR. 582). It is unknown why Welch did not submit the quotation to Grindle but it can be surmised that it was for the reason that Welch himself wished to quote on the complete dipstick rather than having the Plastic Process Company quote on the plastic components and the wood filler for the dipstick. In that way it would be possible for Welch to enter into the business of manufacturing and selling dipsticks which he was particularly interested in doing for financial reasons (TR. 496), and for the same reason Welch might have removed the filler placed in the assembly sent up by Kerr before he took the standard plastic excursions out to Grindle (TR. 683).

Welch in his deposition (Plaintiff's Exhibit 34) admitted that the Plastic Process Company had submitted a quotation for the component parts of a dipstick including the wood filler, the square tubing and the two round pieces of tubing (page 11, lines 21-24), whereas, at the trial he testified that the quotation of May 11, 1948, did not include the wood filler (TR. 584). It is submitted that Welch's position at trial was untenable because otherwise Kerr would not have been able to make the following statement in his letter of May 11, 1948:

"I should like to quote on all of the components as that would enable us to furnish an assembly ready for calibration with an assurance that all of the parts will go together."

By "all components" Kerr must have meant that he intended to include the wood filler in the quotation.

Otherwise, he could not be sure that all of the parts would fit together.

4. Redesign of the dipstick by Grindle to incorporate the use of standard plastic extrusions.

After receiving the standard extrusions from Welch, Grindle took the extrusions back to the drafting department at Pan American and gave them to the drafting supervisor, Mr. Ray Chong, hereinafter referred to as "Chong" (TR. 107). This was corroborated by Chong, who stated that Grindle had brought him a sketch together with some square tubing and some round tubing in a separate state (TR. 271). The preparation of the drawing was delayed (TR. 272) but the drawing was finished on June 4, 1948 (TR. 273) and was identified as Pan American drawing No. D-32.061.114. The drawing was officially released on June 7, 1948, after it had been signed by Grindle (TR. 683). However, prior to the date the drawing was released, Welch called on Grindle and asked for the opportunity to quote on the entire dipstick assembly. Grindle gave Welch permission to quote and gave him an advance copy of the drawing so that he could make up a sample dipstick (TR. 112 and 683). At the same time Grindle returned the standard extrusions to Welch (TR. 114) and gave him an Ozalid of the calibration chart (TR. 115).

Prior to the time that Grindle gave Welch permission to quote on the complete dipstick, Grindle had intended to make up a production model in the shop at Pan American in order to test the dipstick to see if it would be acceptable (TR. 112). Since

the drawing was dated June 4, 1948, the advance copy given to Welch was given to him on that day or a day or two prior to June 4, 1948 (TR. 113). Chong corroborated the fact that advance prints were often given of drawings made at Pan American (TR. 272).

The advance copy of the drawing given to Welch was substantially in the same form as that shown in Defendant's Exhibit P except the drawing at that time called for plugs of $1/16''$ in thickness for sealing the ends of the dipstick instead of the $11/32''$ plugs which are shown in the drawing at the present time (TR. 113 and 683).

The sample production dipstick constructed by Welch.

Within a few days after Grindle had given Welch an advance copy of the drawing, Welch returned with an assembled dipstick for testing purposes. The dipstick contained a wood filler which accommodated the standard tubes. The Ozalid print which had been given to him by Grindle was cemented on the wood filler and each of the ends were sealed within plastic plugs (TR. 115).

It will be recalled that there was a conflict in testimony as to whether or not the standard extrusions had been delivered to Grindle with a filler (see heading II C 3 in this brief). It is submitted that it is far more reasonable to conclude that Welch first went to see Klein after the standard extrusions had been returned to him by Grindle and not at the time the sample was received from Los Angeles. When the standard extrusions were returned to Welch

by Grindle, Welch would have reason to make up wood filler because he would need one for assembling the sample production dipstick. This conclusion buttressed by the fact that Klein testified that Welch only brought over three pieces of plastic tubing (TR. 535). Welch failed in trying to convince Klein prior to the trial that he had also brought over a wood filler (TR. 548).

After receiving the sample production dipstick from Welch, Grindle made plans to test it and called in Mr. Harold Schmidt, hereinafter called "Schmidt" because he was the one who had initiated the request for a new dipstick design (TR. 117). The test took place prior to or on June 7, 1948 (TR. 117) and was for the purpose of determining whether or not a new type dipstick would withstand the abuse that it would have to take (TR. 118). The test consisted of dropping the dipstick from a walkway which was approximately 15 feet above the hangar floor and which fairly well simulated the height of an airplane wing (TR. 118). The dipstick was thrown repeatedly against the hangar floor with definite attempts to throw the dipstick in such a manner that it would strike the hangar floor on one of its ends. It was not until the ninth throwing of the dipstick that a shifting of the wood filler caused the end plug to be pushed out and to crack the square tubing (TR. 119).

Schmidt witnessed the entire test and took part in the test (TR. 118). Schmidt corroborated the entire dipstick test and specifically recalled that the dipstick test had calibration paper wrapped around

wooden filler and that the ends of the dipstick were sealed with end plates (TR. 282). Schmidt also testified that the dipstick withstood the test quite well but the impact of the test caused one of the end plates to be displaced (TR. 284).

Since the sample production dipstick submitted by Welch had been tested to destruction, Grindle, before trial, made up a replica (Plaintiff's Exhibit 9) of the dipstick submitted by Welch.

After completing the destruction test, Grindle concluded that the ends of the dipstick would have to be strengthened (TR. 119). He, therefore, increased the thickness of the end plugs to $11/32''$ as shown in drawing D-32.061.114 (Defendant's Exhibit P) to get more adhesion strength from the plugs so that they would resist the impact of the wooden filler when the dipstick was dropped on one of its ends (TR. 121).

Welch admitted that he was requested to make up a sample production dipstick so that it could be tested for durability (TR. 436). However, Welch denied that he had ever submitted a completed dipstick to Grindle for testing purposes and contended that the durability test was made with the incomplete sample that he had left with Grindle at the time of his second visit with Grindle (TR. 436). According to Welch's testimony, the sample dipstick tested consisted of only four pieces, the square tubing, the two round tubes and the wooden filler holding the round tubes in place. This sample dipstick did not include a scale or end plugs (TR. 574).

It is submitted that it is highly improbable that Grindle would have conducted a durability or destruction test upon a dipstick that had not been completed, particularly when there were no end plugs to prevent the filler and round tubes from shifting relative to the square tube. Such an assembly, if dropped, would almost immediately fall apart.

6. Quotation on the dipstick by Welch.

Within a day or two after Welch had delivered the sample production dipstick for testing, he delivered a quotation (Plaintiff's Exhibit 10) bearing a date of June 7, 1948, for 300 dipsticks (TR. 127). The pertinent portion of the quotation reads as follows:

“300—dipsticks, complete (per sample submitted but with printed scale).....\$3.00 a

While our quotation is based on 300 units, we can assure you that 100 units will be furnished you for the same price, or less.

Please make out any orders to our San Francisco office, to be mailed to 55 New Montgomery St., S. F. 5, Calif.”

This quotation of June 7, 1948, refers to a sample submitted by Welch. Undoubtedly, the sample referred to is the sample production dipstick which was tested to destruction by Grindle (TR. 127). Welch, however, testified to the contrary and stated that the sample referred to in the quotation was the incomplete one delivered to Grindle on or about May 14, 1948 (TR. 465).

The quotation of June 7, 1948, however, definitely notes on dipsticks which are complete. The only exception referred to on the quotation is to the scale and for that reason it must be assumed that the sample referred to was complete with end plugs and that it was the sample production dipstick submitted to Grindle for destruction tests. The reference to the printed scale in the quotation merely meant that Welch was to supply printed scales rather than the solid scale which was in the sample production dipstick (TR. 127).

The letter of June 10, 1948.

Within a day or two after Welch delivered the quotation of June 7, 1948, Welch asked Grindle for a release from Pan American to sell the dipstick to other airlines (TR. 128). Welch asked Grindle if he thought the dipstick would be of any use to other airline operators. Grindle replied in the affirmative because the dipstick was a substantial improvement over anything used at the time and for that reason Welch would have no trouble in selling it to other people (TR. 128). At the same time Welch asked for the release, he stated that in consideration for the release he would continue to sell the dipsticks to Pan American for \$3.00 each (Tr. 129). Grindle stated that before he could give a release it would be necessary for him to check with his superiors (TR. 129).

During the same conference, Grindle informed Welch that he would initiate a requisition for 100

dipsticks and that a purchase order would be forthcoming (TR. 130). It is evident from the letter of June 9, 1948 (Defendant's Exhibit J), written by Welch to Plastic Process Company that the above conference took place on June 9, 1948. The following pertinent portion of the letter was read into evidence by Kerr:

"P.S. As mentioned to Ted over the phone, am going to make up 100 only dipsticks, complete with printed scales and *plastic plugs* in each end. These people originally asked us to quote on 50 units, however, the engineer informs me that now he'll only be able to order 100 units (they may take another 100 or so at a later date, however)." (Emphasis supplied) (TR. 391-392).

In the quoted paragraph of the letter, Welch stated that he was going to make up 100 dipsticks complete with printed scales and plastic plugs at each end. It is apparent that here again there is documentary evidence that Welch knew that the dipsticks required plastic plugs in each end and that they were to be complete with printed scales.

In accordance with his promise to Welch, Grindle issued a requisition and apparently sent a copy to Welch because Welch stated in the letter of June 9, 1948, that one was being mailed to him on that day (TR. 130).

Grindle asked his superiors whether Pan American could give permission to Plastic Process Company to sell the dipstick to other airlines and informed them that in consideration for such permission, Pan American would receive a price concession from the Plastic Process Company (TR. 136). Grindle's supervisors gave him permission to give such a release on this condition (TR. 136). Grindle then wrote the letter (Plaintiff's Exhibits 12 and 13) which is dated June 1, 1948. The original letter was introduced in evidence as Exhibit 12 and the Pan American carbon copy was introduced in evidence as Exhibit 13.

The first paragraph of the letter states that Grindle was enclosing therewith three copies of drawing No. 132.061.114 (Exhibit P) and that a purchase order would be issued for 100 units based on the quotation dated June 6, 1948.

The second paragraph of the letter states that the design of the dipsticks had been altered from the original sample "to incorporate solid blocks in each

end for additional strength." This refers to the 11/32" end plugs which were substituted for the 1/16" end plates in drawing D-32.061.114 after the destruction test had been completed on the original production sample delivered by Welch.

The second paragraph of the letter of June 10, 1948, also stated that the assumption was made that the use of solid plastic blocks in the ends would not increase the cost of the dipsticks more than 25c per unit. The drawing D-32.061.114 previously called for 1/16" end plates and, therefore, the 25c was added to the \$3.00 quotation made by the Plastic Process Company to take care of the increase in cost (TR. 129 and 133).

The third paragraph of the same letter stated that Grindle was sending an original graduation chart to Welch under separate cover to avoid damage. The chart was to be used by Welch for reproducing scales for the dipstick (TR. 133).

The fourth and fifth paragraphs of the letter of June 10, 1948, read as follows:

"This liquid column type dipstick was developed to satisfy our needs for an accurately calibrated, durable airplane fuel quantity measuring device which can be read easily under all operating conditions. In testing the durability of the sample stick, we threw it to the concrete hangar floor from a height of twenty feet with full force, to obtain an accelerated service test of repeated dropping from the airplane wing. After the ninth time it cracked the end, therefore, although it far exceeded our expectations,

we have incorporated solid plastic blocks in the end to make it even more durable. The cellulose acetate butyrate plastic sticks will undoubtedly far exceed the durability of the wooden sticks now used by us and most airline operators, due to its high resistance to impact, abrasion, hydrocarbons and discoloration.

There should be a demand for this plastic stick among other operators and merely by changing the calibration slip, it could be adapted to aircraft types other than the DC-4."

These paragraphs of the letter explain why the dipstick was developed and some of its more salient features and characteristics. They also explain why there should be a demand for the dipstick among other airlines (TR. 134).

The fourth paragraph of the letter also clearly corroborates Grindle's testimony concerning the destruction test made on the sample production dipstick submitted by Welch.

The sixth and last paragraph of the letter reads as follows:

"This letter will constitute release of the design to you to market as you see fit."

In this paragraph Grindle intended to give the Plastic Process Company, Pan American's permission to sell the dipstick to other airline users, but did not intend to convey any of his own personal rights such as patent rights that he might have in the invention (TR. 137 and 323). At that time, Grindle was well aware that Pan American had practically no interest

in patents on production items since they were not manufacturers. Grindle was also well aware that it was the patent policy of Pan American to merely retain a shop right in the invention even though the invention may have been developed completely at company time, and for that reason he would have patent rights in the dipstick he had invented (TR. 138).

The Pan American carbon copy of the letter of June 10, 1948, differs from the original copy of the letter in that the Pan American office copy shows the blind distribution. The Pan American office copy also contained the special note telling the Pan American Divisions that one of the production dipsticks would be sent to each of them for comment and possible use and mentioned that the dipstick would cost approximately \$3.00 each (TR. 133). This note definitely indicates that Grindle was of the opinion that Pan American was to receive a price consideration and that the dipsticks would continue to cost approximately \$3.00 each. The price consideration for the release given to the Plastic Process Company was not stated in the body of the letter because Grindle did not want other prospective customers of the Plastic Process Company to know that Pan American was to receive a reduced price (TR. 136).

Welch contended that the release given in the letter of June 10, 1948, was unsolicited and was given gratuitously (Welch deposition, Exhibit 34, page 2, lines 8-9). It is clear, however, from the letter of June 9, 1948, written by Welch to Plastic Process

company that such permission was requested. It is also submitted that a large corporation such as Pan American does not ordinarily give such a release gratuitously and without being asked.

It should be noted that the letter of June 10, 1948, was addressed to the Plastic Process Company, Inc., and the release given therein was given to the Plastic Process Co., Inc., and not to Welch as an individual. At this time Grindle did not know that Welch was going to undertake the manufacture of the dipstick themselves but was of the opinion that the Plastic Process Company was going to make the dipsticks. Welch was only a representative of the Plastic Process Company and not an employee (TR. 605).

The issuance of the Pan American purchase order to the Plastic Process Company.

On June 21, 1948, Pan American's purchase order No. 30-3017541 (Exhibit 11) was issued to the Plastic Process Company. The order called for 100 C-54DC fuel tank dipsticks at a price of \$3.25 each. The purchase order states it is confirming to Mr. Welch indicating that a requisition had already been sent to Welch. A copy of drawing D-32.061.114 (Exhibit 12) was enclosed with the order. The purchase order shows a delivery of one month which indicates that Welch had promised to deliver the dipsticks within a month after receipt of the order (TR. 455).

9. Planning at Pan American to prepare for the receipt of the order of dipsticks.

On June 14, 1948, Grindle wrote a letter (Exhibit 14) to the Division Operation Manager telling him the preparations that would be required to use the new type liquid column plastic dipsticks. Grindle wrote another letter (Exhibit 15) dated June 22, 1948 to all Station Operation Managers, all Chief Mechanics and all Flight Engineers stating the changes required in the Maintenance Manual and Operation Manual maintained by Pan American to implement the use of the new type dipstick. The letter also stated that Pan American planned to place one of the new type dipsticks aboard each airplane starting August 1, 1948.

These letters show that well prior to the date the dipsticks were to be put into use, the people involved at Pan American had been fully instructed in their use.

10. Welch's steps in producing dipsticks.

After receiving the purchase order from Pan American, Welch sent his purchase order (Defendant's Exhibit L) to the Plastic Process Company. The purchase order was dated June 23, 1948, and was forwarded with a letter (Defendant's Exhibit K) also dated June 23, 1948. The first paragraph of the letter confirms that Welch had promised delivery within three or four weeks. The letter also states that the print (Defendant's Exhibit P) called for an 11/32" plastic plug and asked for all information or suggestions.

ions as to how to best assemble the dipstick. A letter (Defendant's Exhibit T) from the Plastic Process Company to Welch dated June 28, 1948 stated that the Pan American dipstick order would be shipped that week.

During the time Welch was filling this first order, Welch informed Grindle of the trouble he was having in printing up the scales for the 100 dipsticks ordered by Pan American. Welch told Grindle that he had difficulty with the printing plate and that it would be very expensive to make another one. Welch stated that he could not tolerate such an expense in connection with the Pan American order (TR. 691). Grindle then told Welch that Pan American had facilities of its own so he could make the charts for him. Grindle had several hundred copies of the charts made on a Multilith machine at Pan American. The charts were in three sections because of the size of the Multilith machine. These charts were given gratuitously to Welch (TR. 692).

Welch, on direct examination, testified that the initial charts for the dipsticks was made by Mr. Frank Burke of the Independent Press Room (TR. 459). However, this testimony is directly contrary to testimony in his deposition (TR. 595-598).

Welch also testified that he had difficulty in sealing or plugging the ends of the dipsticks and for that reason delivery was delayed from July 21 to August 12, 1948 (Tr. 437). Instead of using end plugs as specified in Grindle's drawing D-32.061.114, Welch, indicating his lack of knowledge of plastics, tried fill-

ing the ends of the dipsticks with cellulose acetate butyrate cement (TR. 473). Since this cement was comprised of a large percentage of solvent which evaporated upon drying of the cement, the ends of the dipstick were drawn in and distorted (TR. 473). Grindle realized that Welch was having trouble sealing the ends of the dipsticks but considered that it was due to his mechanical inaptitude (TR. 201).

In attempting to properly seal the ends of the dipstick Welch consulted several plastic companies including a Vernon C. Rollins hereinafter called "Rollins," of Monsanto Chemical Company (TR. 474). Rollins suggested the use of a plurality of thicknesses of sheet material for sealing the ends of the tube (Tr. 297-298). Welch secured some sheet plastic and caused a plurality of thicknesses of sheet material to be cut out to the conformation suggested for the end plugs in detail 6 of Grindle's drawing D-32.061.114 (TR. 475). These were laminated together to form end plugs of substantially the same thickness recommended by Grindle's drawing D-32.061.114 (Defendant's Exhibit P). Also see patent No. 2,534,644, column 2, lines 21-31 for a description of the manner in which the end plugs were made. These laminated end plugs serve the same function as the solid plugs shown in Grindle's drawing D-32.061.114 in that they serve to keep to a minimum the amount of cement required to seal the ends of the dipstick. Thus, when the solvent evaporates as the cement dries, the ends of the dipstick are not drawn in or distorted. This is because the percentage of solvent relative to the total mass filling the ends of the dipstick is very small.

1. Receipt of the first production dipsticks by Pan American.

Welch delivered 54 of the dipsticks on Pan American PO 30-3017541 on August 12, 1948. On a Receiving Report No. 49986 (Plaintiff's Exhibit 17) dated August 12, 1948, 47 of the dipsticks were received. The receiving report bears a notation that the other 7 dipsticks were rejected. Receiving Report No. 49700 (Plaintiff's Exhibit 16) states that the 7 dipsticks were rejected because the scales were improperly located in the tubes. The receiving report No. 49700 shows clearly that the 7 dipsticks were rejected because of improper location of the scales which would indicate that the first dipsticks were supplied with the sectional scales made by Pan American rather than the one piece scales made by the Independent Press Room as testified by Welch (TR. 459). Grindle, at the time Welch delivered the first dipsticks to Pan American on August 12, 1948, expressed dissatisfaction with the distorted ends but did not reject the dipsticks for this reason since they were still functional (TR. 126).

The delivery of the 54 dipsticks by Welch was two weeks after the deadline set by Pan American (TR. 141). Under the original schedule set up, it had been planned that the dipsticks would have been distributed and placed in use around the world prior to August 1, 1948 (TR. 141).

2. Public use of the dipsticks more than one year prior to August 17, 1949.

Immediately after the dipsticks were received on August 12, 1948 by Pan American, Grindle took sev-

eral of the acceptable dipsticks to the Pan American equipment shop and instructed them to immediately put the new type dipsticks on the airplanes. From that day on every Pan American airplane that left San Francisco had the new type dipstick on it. Grindle took several of the dipsticks to the flight engineering office and left them with the flight engineers (TR. 143).

The dipsticks delivered by Welch on August 1, 1948 were made in accordance with Pan American drawing D-32.061.114 (Defendant's Exhibit P) with the exception of the plugs in the ends. The ends were filled with cement rather than being filled with plugs as required by the drawing (TR. 143).

13. The "A" change on Pan American drawing D-32.061.114

Shortly after the first dipsticks were received on August 12, 1948, Grindle caused a change to be made to drawing D-32.061.114 which is the "A" change shown in the upper right hand corner of the Pan American drawing D-32.061.114 (Plaintiff's Exhibit 8). The "A" change was made so that the dipsticks delivered by Welch could be accepted by the receiving department.

Since the dipsticks were not made in accordance with the drawing, they could not have been received without the explicit approval of Grindle unless the drawing was changed (TR. 322). The end plugs or blocks were deleted by the "A" change in the drawing and the change called for the ends of the dipsticks to be filled with cement (TR. 322). The change in the

rawing had to be made in this manner because under Pan American procedure, after the drawing had been officially released on June 7, 1948, a change letter had to be prepared and changes made had to appear on the drawing (TR. 110). Pan American made this change to their drawing merely to accommodate Welch and for no other reason.

k. Price increases granted to Welch.

The first dipsticks delivered by Welch were for the -54 transport and those dipsticks became a stock item as soon as they were accepted and placed in stock. Pan American then set up a minimum stock order point and automatically reordered dipsticks for the -54 planes as needed (TR. 148).

Shortly after the first dipsticks were delivered by Welch, Pan American received some new airplanes, the Boeing Stratocruiser B-377 and Grindle had a new drawing made up showing the dipstick assembly to be used for the B-377 plane together with the calibration chart. A copy of this drawing appears in the patent application file (Exhibit H-1). Grindle then initiated a requisition for the first order of Boeing dipsticks (TR. 149).

Prior to the placement of the second order for the dipsticks with Welch by Pan American, Welch came to Grindle's office and stated that he was not doing so well in manufacturing the dipsticks and had actually lost money in making the first dipsticks for Pan American (TR. 149). Grindle then stated that Pan American was not interested in having Welch lose

money because if that were true he would not be able to supply dipsticks to Pan American for any length of time. Grindle then asked Welch how much he needed for making the dipsticks and Welch replied that he did not have all of his cost figures. Grindle then volunteered a price of \$3.80 and asked him if he could make out all right on that. Welch stated that such a price would be fine. The second requisition for the dipsticks for the Boeing airplane was therefore issued for \$3.80 each (TR. 149).

Sometime after Welch had delivered the dipsticks for the Boeing aircraft at \$3.80, he again came to Grindle's office and stated that he was still not making any money and asked if he could raise the price. Grindle replied that if Welch was going to raise the price again he would have to explain it in writing when it was necessary. Grindle stated that he was working for Pan American and, therefore, could not encourage Welch to raise his prices (TR. 151). Welch then wrote a letter (Exhibit 20) to Pan American dated February 10, 1949 explaining that he wanted to increase the prices on the dipsticks.

This letter of February 10, 1949, gives the past history of the price increases on the dipsticks and states that in consideration of the cooperation given by the Pan American engineering department a price of \$3.50 was charged for the first dipsticks supplied to Pan American. This reaffirms Grindle's testimony that Pan American was to receive a price consideration for the permission to sell to other airlines given in the letter of June 10, 1948.

Welch in the same letter explained that the production of the first 100 dipsticks resulted in a loss and that the second 100 dipsticks furnished to Pan American at \$3.80 also resulted in a loss. Welch stated that since delivering the dipsticks for the last Pan American order, he had made a complete cost survey and arrived at the conclusion that to make the business profitable he would have to sell the dipsticks for a list price of \$6.50 each. He also stated that he had set up a price of \$5.00 for each dipstick for sales to the Government and for sales to manufacturers and distributors. He stated that he would furnish the dipsticks to Pan American for the wholesale price of \$5.00 each thereby giving Pan American a price consideration of \$1.50 for each dipstick. This also reaffirms Grindle's testimony that Pan American at all times was to receive a price consideration (TR. 152).

After receiving the letter of February 10, 1949, from Welch, Grindle wrote a letter (Exhibit 21) dated February 25, 1949, to the other Pan American divisions stating that the price on the dipsticks was to be \$5.00 each to Pan American only and that other users would pay \$6.50 each. The letter also states that the special price to Pan American was due to Pan American's development assistance and that the price would hold firm on all Pan American orders (TR. 153).

15. Grindle's transfer from the Engineering Department at Pan American.

On June 1, 1949, Grindle was promoted to the position of Technical Assistant to the Chief Flight Engineer. From that time on Grindle had nothing to do

with the design and procurement of dipsticks by Par American (TR. 155-156).

**D. THE FILING OF THE PATENT APPLICATION BY WELCH
THE ISSUANCE OF PATENT NO. 2,534,644, THE DISCOVERY
BY GRINDLE AND GRINDLE'S STEPS SUBSEQUENT
THERE TO.**

1. The filing of the patent application and issuance.

Welch caused a patent application to be prepared on Grindle's dipstick and falsely swore under oath that he was the original and first inventor or true inventor. The application was filed on August 17, 1949 and issued on December 19, 1950 (see soft copy of patent—Plaintiff's Exhibit 2).

2. Welch's falsely dated drawing.

The patent application was prepared by a Mr. Baldwin Vale and Mr. Vale's patent application file (Defendant's Exhibit H-1) contained a copy of a drawing (Defendant's Exhibit R-1) dated May 12, 1948. Welch testified that Klein had made the drawing at his request (TR. 550). On direct examination, Welch was unable to recall when the drawing was completed but stated that the drawing must have been made around June of 1948 because the drawing shows square edge grooves rather than round grooves (TR. 552). The following contradictory testimony appears on page 5 beginning with line 11 of the Welch deposition (Exhibit 34):

“Mr. Hohbach. Q. Who was the draftsman for this drawing?

A. Lou Klein, my next-door neighbor. I have already furnished you with the address.

Q. When was the drawing made up?

A. When we were making up the dipstick. At the time we made up the first sample.

Q. I see it is dated May 12, 1948. Was the drawing made up on that date?

A. Well, *I certainly would assume that it is the day I signed the drawing.*" (Emphasis added.)

"Q. That would mean that the drawing was made up prior to that, is that correct?

A. *It would have to be made up prior to the day I signed it, prior to the moment I signed it.*" (Emphasis added.)

From this it is apparent that Welch testified that the drawing was made up on or before May 12, 1948, the date which it bore. Welch, however, admitted on direct examination that he had falsely dated the drawing and that it was not made up on or before May 2, 1948 (TR. 554).

Defendant's witness, Klein, also was unable to recall when the drawing was made (TR. 532). Klein stated that the drawing would have had to have been made before the fillers with radial grooves were made which would have been before he saw fillers with radial grooves at Shaffer's mills (TR. 532). Klein, however, was unable to recall that this was a fact but merely stated this contention was based on his opinion that he considered himself a perfectionist and that if the wood fillers with radial grooves had been used at the time he made the drawing, he would have shown radial grooves (TR. 532).

It is submitted that the drawing was falsely dated by Welch for reasons hereinafter given and that the drawing was actually made at a much later date to convince Mr. Baldwin Vale, Welch's patent agent, that Welch was the inventor of the dipstick instead of Grindle. Klein's assumption that he would have shown radius grooves instead of square cut grooves if radius grooves had replaced the square cut grooves in the fillers certainly does not establish the fact that the drawing was made by a certain date. In addition there is no corroborating evidence as to when the grooves in the fillers were actually radiused. Klein and Welch's testimony that the grooves in the fillers were radiused at a certain time is based only upon a receipt from Shaffer's mill (Exhibit Q) which merely states that the Plastic Process Company was billed for 500 lineal feet of wood cut to a "pattern." This pattern easily might have been a pattern with square cut grooves rather than radial grooves.

The falsely dated drawing bears the notation "Print No. 5." Welch admitted that there were no other previous prints and that he had merely added the notation to add prestige to the drawing (TR. 554).

After Welch retrenched from the position that the date of May 12, 1948 was the date the drawing was made, he testified that the date of May 12, 1948 was supposed to represent the date he conceived the main parts of the dipstick (TR. 554). This is also untrue because the drawing shows much more than Welch had knowledge of on May 12, 1948, or by June 1, 1948 (TR. 598-603).

Welch contended that he was not aware on May 12, 1948, that end plugs were required for sealing the ends of the dipstick (TR. 570), yet end plugs are definitely shown on the drawing. Klein testified that the end plugs in the drawing were shown in no particular manner (TR. 540) and stated that the parallel lines just represented shading (TR. 540).

It is submitted that the drawing actually shows laminated end plugs of which Klein had knowledge, but not until a date much later than the time he testified the drawing was made (TR. 540).

Welch testified that one of the first types of laminated plugs used by him consisted of as many as eight laminations (TR. 475). The end plugs in the drawing show the use of approximately 7 or 8 laminations (TR. 606). Since Welch admitted that he did not begin using laminated end plugs until the latter part of October or the first part of November, 1948 (TR. 499), it is apparent that the falsely dated drawing must have been made after that date (TR. 696).

Klein testified that the cross sectional view of the assembly drawing (Exhibit R-1) of the dipstick was his own peculiar way of doing things (TR. 540). However, attention should be called to the amazing similarity between the assembly view shown in Grindle's drawing D-32.061.114 and the assembly view shown in the Klein falsely dated drawing. By the time the Klein drawing was actually made, Welch had received several copies of drawing D-32.061.114. It was therefore very possible that Klein could have seen one of these

copies of the drawing before he made up the drawing dated May 12, 1948.

The falsely dated Klein drawing also shows a dipstick of the valve control type. On cross-examination Welch testified that he could not recall the time when he first considered such a device (TR. 599). Welch, however, in his deposition recalled a conversation with Grindle concerning the use of dipsticks utilizing a Shrader type valve and that Grindle furnished him with one of the valves at that time (Exhibit 34, page 47, lines 3-7). Welch also stated that the conversation could have taken place at any time from 1948 well through 1951 and admitted that it was safe to assume that the conversation took place after he had gotten into the production of dipsticks (Exhibit 34, page 4, lines 7-26). Since Welch did not deliver his first dipsticks to Pan American until August 12, 1948, this would place the conversation concerning the Shrader type valve after August 12, 1948. Klein admitted that Welch had suggested the valve control model to him when he was making up the drawing (TR. 694) which would mean that Klein made up the drawing sometime after August 12, 1948.

Welch at no time testified to what particular use he wished to make of the drawing which he had Klein prepare. It is submitted that the falsely dated Klein drawing was made up for the specific purpose of claiming the dipstick Grindle had developed. By presenting an earlier dated drawing to his patent agent, Mr. Baldwin Vale, Welch would be able to claim that the dipstick invention was his even though all of he

ther drawings then in existence on the dipstick bore the name of Eugene L. Grindle, as designer.

If this were the case, it is safe to assume that the drawing dated May 12, 1948 was made up in the early part of 1949 because the earliest contact Welch could establish with Mr. Vale was Welch's check dated February 7, 1949 which was used to pay for a patent search. Welch admitted giving a copy of the Klein drawing to Vale (Welch's Deposition, Exhibit 34, page 2, line 26 to page 53, line 1). A copy of the Klein drawing is in Vale's patent file (Defendant's Exhibit 1-1). In the patent file is also a copy of the Pan American drawing bearing a date of February 4, 1949 (TR. 556) covering the dipstick which Grindle had designed for the Boeing B-377 aircraft. By use of the earlier and falsely dated Klein drawing, Welch could easily claim that it was his invention involved in the dipstick and not the invention of anyone connected with Pan American.

It is submitted that it is inescapable from the evidence to arrive at the conclusion that Welch falsely dated the Klein drawing so that he could claim that he was the true inventor of the dipstick.

GRINDLE DID NOT DISCOVER THAT WELCH HAD PATENTED HIS DIPSTICK UNTIL SEPTEMBER 28, 1953.

It did not come to Grindle's attention until September 28, 1953 that Welch had patented the dipstick which Grindle had disclosed to him. On September 28,

1953, Grindle was called to witness a calibration check on the fuel tank quantities of the B-377 aircraft (TR. 156). When Grindle arrived at the scene of the test, William R. Burfeind, hereinafter called "Burfeind" who was in charge of the test, happened to notice that the dipstick he was using bore a patent number and called it to Grindle's attention (TR. 157, corroborated by Burfeind TR. 653).

This was the first knowledge Grindle had that Welch had patented the dipstick and it came as a complete surprise to him (TR. 158, corroborated by Burfeind TR. 654). Burfeind was able to verify that the test took place on September 28, 1953 from the rough draft of the test data that had been prepared during the test and which he had with him in court (TR. 654).

F. GRINDLE'S ACTIONS AFTER HIS DISCOVERY THAT WELCH HAD PATENTED HIS DIPSTICK.

1. Grindle's call to Welch.

After discovering that Welch had patented the dipstick which he had disclosed to him, Grindle at his earliest opportunity called Welch and asked him what right he had to patent the dipstick. Welch informed Grindle that it was no business of his and that the dipstick was his invention (TR. 161).

After discovering Welch's hostile attitude, Grindle dug out the old files at Pan American and found that the files had actually been inactive from the time that he had last been on the project up to the time that Burfeind had started the calibration test (TR. 16).

Welch's overcharges to Pan American.

In going through the files, Grindle found Welch's letter dated February 10, 1949 (Plaintiff's Exhibit 10) in which Welch had agreed to sell dipsticks to Pan American for \$5.00 each (TR. 162). Grindle then checked with the supply department and found that Welch, contrary to his agreement, had gradually increased the prices of the dipsticks from the agreed price of \$5.00 until he was charging \$12.50 (TR. 162). Prior to this discovery, Grindle had no knowledge that Welch had increased the prices on the dipsticks (TR. 163).

As soon as Grindle discovered the tremendous overcharges Welch was making on the dipsticks, he took the files to Mr. George Fox, the legal officer at Pan American. After a check with the accounting department, it was found that the Welch overcharges to Pan American in a two year period were over \$10,000.00 (TR. 162). Mr. Fox in examining the overcharge situation found that each time that Welch had increased the price on the dipsticks he had notified the supply department at Pan American and that the supply department subsequent thereto had issued purchase orders. Mr. Fox considered that this was tacit approval of the price increases and that, therefore, Pan American would have difficulty in recovering the overcharges in court (TR. 164). The supply department personnel at Pan American had never been informed of the price agreement and for that reason did not realize that Welch was overcharging Pan American (TR. 164).

Mr. Fox informed Grindle that since Pan American was not interested in pursuing the overcharge question, they would not be interested in pursuing the patent question for Grindle and that therefore Grindle would have to pursue that question himself (TR. 316).

3. Grindle's formation of an intent to manufacture and sale of dipsticks and preparation for the manufacture and sale of dipsticks.

When the overcharge matter came up, Pan American made a cost study to determine whether it was feasible for them to go into the manufacture of dipsticks for their own use (TR. 315). After reviewing the cost study, Pan American decided they would not go into the production of dipsticks (TR. 316). After Pan American made this decision, Grindle made his own independent study to see whether it would be feasible for him to go into the manufacture and sale of dipsticks (TR. 315). After completion of his own cost study, Grindle decided in October 1953 to go into the manufacture and sale of dipsticks, particularly to Pan American (TR. 167).

As soon as Grindle had completed a special design project (TR. 317) he consulted with his patent attorneys on the possibility of taking action against Welch for fraudulently patenting his invention. He also discussed with them his undertaking the manufacture and sale of dipsticks (TR. 317). His patent attorneys asked that he obtain a release from Pan American on the invention because such a release in writing would be desirable if legal action was to be taken against

Welch (TR. 318). Grindle requested a release and received a document (Defendant's Exhibit A) which stated that all rights in the dipstick belonged to Grindle, with the exception that Pan American retained a shop right (TR. 226). The release also stated Pan American's policy in connection with inventions made by its employees which was an expression of policy that has been in existence at Pan American for many years (TR. 138). Grindle was aware of this policy long before he made the dipstick invention (TR. 138). After obtaining the release which carried a date of October 6, 1954, Grindle authorized his patent attorneys to write Welch requesting him to assign to Grindle the patent he had fraudulently obtained. After considerable correspondence with Welch's attorney, a conference was held in the offices of Flehr and Swain between Grindle and Welch, their respective attorneys being present (TR. 166). After some initial discussion, Welch stated that he would not assign the patent to Grindle. Mr. Flehr then asked Welch if he would prosecute Grindle or bring action against Grindle if he were to produce a dipstick made in accordance with Grindle's drawing D-32.061.114 (Plaintiff's Exhibit 8). Welch stated that Grindle could make a dipstick in accordance with the extrusion drawing (Plaintiff's Exhibit 6) but that he would enforce his patent against Grindle if Grindle undertook the manufacture and sale of dipsticks made in accordance with Grindle's drawing D-32.061.114 (Plaintiff's Exhibit 8) (TR. 166). After the conference, Grindle authorized the filing of a suit against Welch.

Prior to bringing legal action against Welch, Grindle took all possible steps to prepare his corporation Deterjet Corporation, organized in 1951, for the manufacture and sale of dipsticks. Grindle immediately gave an oral license to the corporation to manufacture and sell dipsticks (TR. 319). He knew he could obtain the financing required from a group who had given him financial assistance on other inventions (TR. 319).

By the time of trial Deterjet Corporation had capital resources of approximately \$10,000.00 which was adequate for the manufacture and sale of dipsticks in large quantities (TR. 170). Graduation scales had been produced at an expenditure of approximately \$500.00, tooling had been manufactured to make certain parts of the dipstick and special jigs had been prepared for accurate assembly of the dipsticks. The corporation had solicited and received quotations on all the components required for the dipstick and several production models had been prepared for demonstration to customers (TR. 172). In addition to money expended by the corporation, Grindle had devoted substantially all his free time away from his job at Pan American in launching Deterjet Corporation into the manufacture and sale of dipsticks (TR. 174). Deterjet Corporation at that time was manufacturing and selling a vibrometer (Plaintiff's Exhibit 22) to the airlines and had been doing so for approximately 3 years (TR. 170-171).

**I. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW
MADE BY THE DISTRICT COURT ARE CORRECT.**

The case was tried before the Honorable Edward P. Murphy who had the opportunity to observe the witnesses and to determine their credibility.

As pointed out in the Statement of Facts, there was conflicting evidence on certain issues in the case. Appellant, Welch, testified extensively in his own behalf and the Honorable Edward P. Murphy had ample opportunity to observe the conduct of Welch and to determine the credibility of his testimony.

Judge Murphy, after carefully considering the evidence wrote a Memorandum Order (TR. 54-64) and therein gave the following comments on the facts:

“In 1948 the plaintiff in the instant case, Grindle, an engineer employed by Pan American Airways, developed at the request of his employer a dipstick, or liquid fuel column gauge, which would render more satisfactory service than those then in use. Grindle developed, apparently without knowing of the Hyde and Schmitt patents, a stick which consisted essentially of several measuring tubes, rather than one, joined in a single assembly, and made of plastic. He then contacted the defendant, Welch, at that time a representative for a plastics products firm, and handed him detailed drawings and a mock-up sample of the stick he had designed, for the purpose of securing price quotations from the defendant's employer. Defendant's employer returned the plans with the report that the particular shapes of plastic required to accommodate the plaintiff's design would be too costly to manufacture, and sent along

several items of standard plastic tubing called 'extrusions', to inquire of plaintiff whether they would be adaptable to his needs. After some experimentation and consideration of various alternative expedients, plaintiff Grindle devised a dipstick incorporating standard plastic extrusion parts. In all essentials, the dipstick, as finally submitted by plaintiff Grindle to defendant Welch and the latter's employer by means of a complete sketch and mock-up sample was the dipstick incorporated ultimately in Patent No. 2,534,644.

At the time of submission of the plans and mock-up of the dipstick to Welch, Grindle had no thought of patenting the stick, and no desire to keep the device secret for purposes of personal commercial exploitation or for any other purpose. He understood that because of the development work done by his employer, Pan American, through himself the employer would receive a favorable purchase price quotation from the ultimate producer of the stick, whether that producer was to be Welch's employer or Welch himself. There was no disclosure by Grindle to Welch of any confidential nature which could lead to a recompensable breach of trust on the part of Welch.

It appears that during the period of final development of the dipstick, Welch had formed the plan to set himself up in the dipstick manufacturing business. He did so, and commenced to supply dipsticks in conformity with the plans drawn by Grindle. There were two minor variations on the stick as delivered and the stick as designed, and these variations (consisting of the substitution of radial grooves for square cut grooves in the wooden filler which spaced the two plastic meas-

ing tubes inside the over-all square plastic housing tube, and of the substitution of plastic cement fill for the solid end plugs which Grindle had originally designed to shut off the ends of the square housing tube) were accepted by Grindle for Pan American because they had no appreciable effect on the functioning of the dipsticks as designed by Grindle. They were minor details of construction or manufacture, 'bugs' that every manufacturer encounters in the construction of his products, and that are eliminated by altering minor details which leave the product as a whole unaffected. The same is true for the protrusion of the tubes beyond the end pieces. Any skilled mechanic, or any person who has had some experience in working with plastics, could have accomplished the substitution of the cement mass for the end plugs, and the radial grooves for the square cut grooves, as well as the protrusion of the tubes beyond the end seals.

Welch commenced production of the sticks and made his first delivery to Pan American on August 12, 1948. That date marked the beginning of public use of the dipstick. Grindle was soon thereafter assigned to other duties and took no further interest in the dipstick. Thereafter, on August 17, 1949, Welch filed for a patent on the dipstick, swearing that he was the true inventor."

Findings 11 through 35 (TR. 66-70) of the Honorable Edward P. Murphy which cover substantially the same facts as those recited in the quoted portion of the Memorandum Order are amply supported by the evidence and should not be disturbed unless clearly erroneous, especially where the evidence is conflicting

and the credibility of witnesses is involved. *Malloy et al. v. New York Life Insurance Co.* (C.C.A. 1, 1939) 103 F.2d 439; *United States v. Appalachian Electric Power Co.* (C.C.A. 4, 1939), 107 F.2d 769; *Occidental Life Insurance Co. v. Thomas* (C.C.A. 9, 1939), 107 F.2d 876.

O'Brien states in his manual of "Manual of Federal Appellate Procedure", third ed., 1941, page 20:

"Where there is a conflict in the evidence and the court below reached its conclusions by determining the weight of the evidence and the credibility of the witnesses and giving due regard 'to the opportunity of the trial court to judge of the credibility of the witnesses', the Appellate Court will not say that the findings are 'clearly erroneous' 'citing *Cherry-Burrell Co. et al. v. Thatcher* (C.C.A. 9) 107 F.2d 65, 69; *Maryland Casualty Co. v. Star* (C.C.A. 9) 109 F.2d 212, 214; *Dant & Russell v. J. D. Halstead Lumber Co.* (C.C.A.) 103 F.2d 306; *Weber et al. v. Alabama-California Gold Mines Co. et al.* (C.C.A. 9) 121 F.2d 663 . . ."

The Honorable Edward P. Murphy properly rejected the contentions of Appellant, Welch, that he had made substantial contributions to the development of the Grindle dipstick.

Judge Murphy also made the following Conclusion of Law (TR. 71):

"5. Patent No. 2,534,644 is void because the application was not filed by the true inventor.

6. Patent No. 2,534,644 is void because the dipstick disclosed in the patent was in public use for more than one year before the application was filed.

7. Patent No. 2,534,644 is void because the dipstick disclosed in the patent was published in drawing D-32.061.114 more than one year before the patent application was filed.

8. Each of the three claims of Patent No. 2,534,644 is invalid because it fails to define invention over the prior art, particularly Hyde and Schmitt."

It will be shown that these Conclusions of Law were correctly made.

7. PATENT NO. 2,534,644 IS VOID BECAUSE THE APPLICATION WAS NOT FILED BY THE TRUE INVENTOR.

There is no dispute that before Welch met Grindle he knew nothing about dipsticks (Welch's Deposition, Plaintiff's Exhibit 34, page 4, lines 2-3) (TR. 407). There is very little, if any, disclosure in the patent which the Appellant can claim as being of his own conception. (See Statement of Facts in this Brief.) It is undisputed that Grindle had the original concept and developed a mock-up dipstick (replica shown in Plaintiff's Exhibit 5) which could be used as a suitable replacement for the wooden dipstick then used by the Airlines. This mock-up dipstick contained all of the basic features which are disclosed in Patent No. 2,534,644. From this mock-up it is readily apparent that it was Grindle who conceived the original idea of enclosing a paper scale mounted on a wood filler within a plastic body and providing holes for fluid columns adjacent these scales so that when fluid was lifted from the tank by closing the holes a reading could be made against the adjacent scale.

Grindle redesigned the dipstick around the standard extrusions suggested by Kerr and had drawing D-32.061.114 made up (TR. 105-111). The dipstick shown in drawing D-32.061.114 is substantially identical to the dipstick shown in the patent drawing except that in the patent drawing the grooves are radiused instead of being square and the end plugs are laminated instead of being solid.

Kerr's suggestion to use the standard extrusion in itself was merely of a type to make the manufacture of the dipstick more economical and did not amount to invention. "Walker on Patents" (Deller's Edition page 143; *Risdon Locomotive Works v. Medart* (1895) 158 U.S. 68.

Even if we view the testimony of the Appellant and his witnesses in the most favorable light, it was Kerr who suggested the use of the standard extrusions consisting of two round tubes and a square extrusion in place of the single extrusion proposed by Grindle in his drawing A-14.123.116. Therefore, Welch cannot claim this suggestion to be his contribution. Again, viewing the testimony of Appellant and his witnesses in the most favorable light, it was Kerr who suggested the use of a wood filler with radiused grooves to accommodate the round tubes. Welch therefore cannot claim that this was his contribution.

End plugs for sealing the ends of the dipstick were used on Grindle's first satisfactory mock-up dipstick (as represented by Plaintiff's Exhibit 5). End plugs were also disclosed in Grindle's drawing D-32.061.114 (Defendant's Exhibit T) which were submitted o

Welch. Welch contended that originally he did not know that end plugs were required but admitted that he received this information from Grindle (TR. 607-609). Therefore Welch cannot claim this to be his contribution. Forming the end plugs out of a plurality of laminations was suggested by Rollins (TR. 297-298) and therefore Welch cannot claim this to be his contribution. There was no testimony as to who suggested the use of a nail for holding the laminations in place. Welch on cross-examination admitted that he had never used a nail for holding the laminations in place in any of the dipsticks he manufactured and sold (TR. 616). It is, therefore, apparent that the use of a nail in this manner is unimportant.

From the foregoing, it is apparent that Welch did not conceive or develop any of the material portions of the liquid measuring gauge shown in the patent No. 2,534,644. The patent is therefore void because Welch falsely swore under oath that he was the original and first inventor of the liquid measuring gauge disclosed herein (35 U.S.C. 115).

PATENT NO. 2,534,644 IS VOID BECAUSE THE DIPSTICK DISCLOSED IN THE PATENT WAS IN PUBLIC USE FOR MORE THAN ONE YEAR BEFORE THE APPLICATION WAS FILED.

A. IN GENERAL.

The patent application for patent No. 2,534,644 was filed on August 17, 1949. It is well established that public use of the invention disclosed in the patent began on August 12, 1948 (TR. 141-143). Since the in-

vention was publicly used for more than one year prior to August 17, 1949, the date of filing of the patent application, the patent is clearly invalid under the Patent Statutes, 35 U.S.C. 102; *Algren v. Kilinsky* (C.A. 2, 1952), 197 F.2d 69.

B. WELCH ADMITTED THAT CLAIM 1 WAS INVALID FOR PUBLIC USE.

In the Answer (TR. 11-12), Welch admitted that he delivered dipsticks as defined in Claim 1 of the patent and that Pan American publicly used the same. Welch in the Answer (TR. 12-13) also admitted that Claim 1 of the patent was invalid because the invention defined therein was offered for sale, sold and publicly used in this country more than one year prior to the date of application for patent. Welch, in the Answer (TR. 13), however, denied that Claims 2 and 3 of the patent were invalid.

C. CLAIMS 2 AND 3 OF PATENT NO. 2,534,644 ARE INVALID BECAUSE THEY DO NOT DEFINE INVENTION OVER THE DIPSTICKS WHICH WERE PUBLICLY USED MORE THAN ONE YEAR PRIOR TO THE FILING OF THE PATENT APPLICATION.

Welch admitted that the first dipsticks which were publicly used by Pan American before August 17, 1949 were delivered to Pan American on August 12, 1949 (TR. 496). The ends of these dipsticks were packed with cellulose acetate butyrate and no blocks or laminations were used (Welch Deposition, Plaintiff's Exhibit 34, page 37, line 14 to page 38, line 13). These

dipsticks were made in accordance with Grindle's drawing D-32.061.114 (Defendant's Exhibit P) except for the fact that the ends were sealed with cellulose acetate butyrate cement rather than with blocks as called for on the drawing (Welch Deposition, Plaintiff's Exhibit 34, page 39, line 19 to page 40, line 13).

The ends of the dipsticks delivered on August 12, 1948 by Welch were distorted which was caused by vaporation of the solvent during drying of the cement (TR. 473). To decrease the volume of cement required, Welch utilized a plurality of laminations and formed them into a plug as suggested by Rollins (TR. 475 and 297-298). The use of these laminated end plugs is disclosed in the patent No. 2,534,644 and claimed in Claims 2 and 3 of the patent. Claim 2 calls for

"laminated plugs hermetically sealing the opposite ends of said body and consisting of superimposed layers of sheet material fitting the contours of said ends with adhesive cement interposed between said layers which will exude and adhere to said body when said plugs are compressed against the ends of said reinforcing bar."

Claim 3 uses similar language in claiming the end plugs but also calls for

"nails extending through the said plugs in opposite ends of said body and penetrating the ends of said reinforcing bar and having heads bearing against said plugs for compressing said plugs when said nails are driven into the opposite ends of said bar respectively."

It is submitted that Claim 2 is invalid because it does not define invention over the dipsticks which were

publicly used more than one year before the filing of the application for patent. Grindle's drawing D-32 061.114 (Defendant's Exhibit P) originally called for sealing the ends of the dipstick with 11/32" block cemented into the ends of the dipstick. Grindle, as an expert, testified that blocks of this thickness could be made numerous ways none of which could be considered to amount to invention. He stated that they could be extruded, machined, molded or made up of a plurality of laminations cemented together to form a block (TR. 123-124). Grindle testified that laminations have been used extensively in the aircraft industry and other industries for many years and that in his opinion forming a block of material from several laminations or layers of material was merely a mechanical expedient and certainly did not arise to the dignity of invention (TR. 123 and 184). The Honorable Edward P. Murphy properly held that

"the variations claimed in Claims 2 and 3 of the patent were changes of a sort which any mechanic, in or out of the plastics field, might have devised in the course of construction." (TR. 59).

The courts have repeatedly held that a change of form or the exercise of an expedient common to many diverse arts amounts to no more than the exercise of mechanical skill. *Market Street Company v. Roly* (1895), 155 U.S. 621, 15 S. Ct. 224, 39 L. Ed. 28; *Schinks Service v. Jones* (C.A. 9, 1949), 173 F.2d 90; *Emmet v. Metals Processing Corp.* (C.C.A. 9, 194), 118 F.2d 796; *Palmer v. Kaye* (C.A. 9, 1950), 185 F.2d 330.

Claim 3 differs from Claim 2 mainly in that it calls for nails extending through the plugs and penetrating the ends of the reinforcing bar or filler. The specification in the patent states that the nail has a dual purpose in that it serves to hold the dipstick off of the bottom of the fuel tank and prevents sediment from settling into the dipstick, and also serves to hold the terminations together (TR. 186).

The use of a nail in this manner is objectionable for several reasons (TR. 187, 700). Welch himself admitted that he had never made dipsticks with a nail (TR. 616). A claim in a patent must define an improvement having utility or it is invalid. 35 U.S.C. § 101; *Gillette Safety Razor Co. v. Windsor Manufacturing Co.* (C.C.A. 3, 1938), 97 F.2d 49. Since the use of such nails would be objectionable and since the nails have little, if any utility, Claim 3 is invalid on this ground alone.

Claim 3 is also invalid for the same reasons that Claim 2 is invalid. The mere use of a nail to hold a laminated structure in place certainly cannot amount to invention (TR. 187). *Vulcan Corporation v. Slipper City Wood Heel Co.* (C.C.A. 6, 1937), 89 F.2d 109.

VI. PATENT NO. 2,534,644 IS INVALID BECAUSE IT DOES NOT DISCLOSE INVENTION OVER DRAWING D-32.061.114.

Grindle's drawing D-32.061.114 (Defendant's Exhibit P) constitutes prior art as to Welch because it was submitted to him on or about June 10, 1948,

well over one year before Welch filed the application for patent. The drawing was published as to Welch when three copies of it were sent to Welch with the letter of June 10, 1948 (Plaintiff's Exhibit 12). It is well established that published drawings can be considered as part of the prior art. "Walker on Patents" (Deller's Edition), page 269; *Bishop & Balcock v. Western Auto* (C.C.A. 6, 1939), 105 F. 2d 886; *Des Rosiers v. Ford* (C.C.A. 1, 1944), 143 F. 2d 907.

Drawing D-32.061.114 discloses a dipstick which is substantially identical to the dipstick disclosed in patent No. 2,534,644 except for the fact that the drawing discloses a solid end plug instead of the laminated end plugs shown in the patent.

Claim 1 of the patent reads directly on the dipstick disclosed in the drawing and therefore is clearly invalid. Claims 2 and 3 of the patent call for laminated end plugs instead of the solid plugs shown in the drawing. The use of such laminated end plugs is merely a mechanical expedient and does not arise from invention and therefore Claim 2 is invalid. Claim 3 in addition calls for the use of a nail extending through the end plugs and penetrating the ends of the reinforcing bar or filler. The use of such common fastening means cannot amount to invention and therefore Claim 3 is also invalid over the teaching in drawing D-32.061.114. *Vulcan Corporation v. Slipper City Wood Heel Co.*, supra.

VII. EACH OF THE THREE CLAIMS OF PATENT NO. 2,534,644 IS INVALID BECAUSE IT FAILS TO DEFINE INVENTION OVER THE PRIOR ART, PARTICULARLY HYDE AND SCHMITT.

The Honorable Edward P. Murphy, in his Memorandum Order (TR. 54-55), discussed the state of the prior art shown by the Hyde and Schmitt patents as follows:

“A patent issued as long ago as May 26, 1863, to one Hyde (No. 38,681) for a ‘cask gauge’ described the essentials of the gauge as being a tube or cylinder ‘made of transparent glass, or its equivalent, and left open at either end’, enclosed within the center of a square slitted rod ‘made of wood, metal, gutta-percha, or any other suitable material, so that either end of the rod shall be flush with the ends of the enclosed tube’, and with suitable gauging scales marked on the four sides of the enclosing rod, each adapted to a particular type of cask, so that by observing the level of the fluid in the central measuring tube, the content of the cask or vessel could be ascertained. The operation of the device is the same as that used by children playing with straws. The tube is inserted vertically into the liquid to the bottom of the vessel. The operator then closes the top of the tube, either with his finger, or with some sort of valve, and withdraws the tube. The atmospheric pressure on the lower end of the tube, as it is lifted from the liquid, retains the liquid in the tube (up to its point of specific gravity). Hyde in his 1863 patent said:

‘It is evident that the height of the column of liquid thus confined in the tube will indicate the depth of its previous immersion in the

body of the fluid, and by comparing this column with a properly graduated scale the quantity of liquid in any given cask or vessel can be accurately ascertained almost at a glance.'

In 1922 another patent was issued to one Schmitt (No. 1,423,156) for essentially the same type of liquid fuel column gauge, differing only in the manner in which the central measuring tube is supported by the outer structure upon which the graduations are marked, and the slits in the outer structure through which the level of the liquid in the measuring tube may be observed."

The Hyde and Schmitt patents do show that the basic idea of raising a liquid column by means of a hollow transparent tube and reading the height of the column on a properly calibrated scale adjacent the tube is old. It was therefore not error for Judge Murphy to decide that the variations in construction shown in patent No. 2,534,644 were merely mechanical expedients and did not arise to the dignity of invention.

From the foregoing it is clear that patent No. 2,534,644 is void and invalid on several grounds. As stated by Judge Murphy in his Memorandum Order (TR. 59) patent No. 2,534,644

"was void and invalid because not filed by the true inventor; because filed more than one year after the first public use of the product described; because it does not teach invention over the prior art disclosed by the Hyde and Schmitt patents referred to earlier. *Each of these grounds of invalidity is sufficient in and of itself to make clear*

that the patent in question is void and of no effect.” (Emphasis supplied).

VIII. APPELLANT'S OPENING BRIEF.

In the following commentary Appellee will follow Appellant's outline. Section A contains the comment for Appellant's Point I, Section B, the comment for Appellant's Point II, etc.

A. THERE WAS A JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES.

The Honorable Edward P. Murphy correctly found that there was a justiciable controversy between the parties. See Section II, F.3. of this brief for a recitation of the facts which had occurred by the time of filing the complaint on March 25, 1955 and the additional facts which had occurred by the time of trial. An Amended and Supplemental Complaint (TR. 17) was filed and entered on March 1, 1956 under Rule 15(b) of the F.R.C.P. to conform to the evidence.

Under Rule 15(b) of the F.R.C.P., a motion to amend to conform to the proof, can be made at any time after presentation of the evidence has begun and is frequently allowed during the course of trial after the close of testimony. *Great Atlantic and Pacific Tea Co. v. Jones* (C.A. 4, 1949), 177 F. 2d 166; Section 49 *Federal Practice and Procedure*” by Barron and Holtzoff.

Under the decisions, the facts as outlined in Section II, F.3. of this brief, and also as set forth in the Amended and Supplemental Complaint are clearly sufficient to establish that there was a justiciable controversy between the parties. The courts have repeatedly held that actual manufacture, use or sale is not essential and that it is sufficient that the party charged is about to infringe or take some action which is prejudicial to the interests of the patentee. *Tremond Co. v. Schering Corporation* (C.C.A. 3, 1941, 122 F. 2d 702; *General Electric Co. v. Refrigeration Patents Corp.* (D.C.W.D.N.Y., 1946), 65 F. Supp. 7; *Aralac, Inc. v. Hat Corp. of America* (C.C.A. 3, 1948, 166 F. 2d 286; *Crowell v. Baker Oil Tools, Inc.* (C.C.A. 9, 1944), 143 F. 2d 1003; *E. W. Bliss Co. v. Cold Metal Products Co.* (D.C. Ohio, 1955), 137 F. Supp. 676, 108 USPQ 47.

Grindle's act in giving an oral license to Deterjet Corporation was in itself an act of infringement. *Moseley v. U. S. Appliances Corporation* (C.C.A. 3, 1946), 155 F. 2d 225; *Toppson v. Tippany Refrigerator Car Co.* (C.C.N.D. Ill., 1889), 39 F. 420; *Trout v. Risdon Iron and Locomotive Works* (C.C.A. 9, 1900), 102 F. 635.

The mere fact that Deterjet Corporation did not have on hand large quantities of plastic extrusions for entry into large scale manufacture and sale of dipsticks certainly was not controlling.

In the recent case of *Crowell v. Baker Oil Tools, Inc.*, supra, in this circuit, Judge Denman noted that the District Court had found that the plaintiff was

not a manufacturer, had no manufacturing facilities, did not have any employees and did not have any machinery with which to manufacture the device which the plaintiff alleged infringed the patent in suit and which he desired to manufacture and sell. He also noted that the District Court found that the plaintiff was not engaged in manufacturing the device which he desired to sell and which he alleged infringed the patent in suit and the plaintiff had no written or oral contract for supplies for manufacturing the devices. Judge Denman then stated for the court that "appellant's making of several infringing devices and his intent to cause the production of more evidenced by his understanding with a friendly company to supply him with the necessary material is sufficient to invoke the right to sue the patent owner under the Declaratory Judgments Act."

The Appellant makes the statement that the decision in *Crowell v. Baker Oil Tools, Inc.*, is generally recognized as being extremely liberal in its findings that an actual controversy existed but cites no authority for such a statement. Actually the *Crowell* case has been followed by a long line of decisions. e.g., *Aralac, Inc., v. Hat Corp. of America*, supra; *General Electric v. Refrigeration Patents Corp.*, supra; *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.* (C.A. 2, 1952), 200 F. 2d 876; *Archer v. United States* (C.A. 9, 1954), 217 F. 2d 543.

The bona fides of Grindle's acts in entering into the manufacture and sale of dipsticks and the bringing of the present action certainly cannot be questioned.

Grindle definitely intended to enter into the manufacturing and sale of dipsticks otherwise it would have been foolhardy for him to have made the substantial expenditure of time and money to cause Deterjet Corporation to prepare for the large scale manufacture and sale of dipsticks and to have made the substantial expenditure incurred by him for legal expenses in bringing his claim for relief (TR. 228).

Grindle had been warned that his proposed action to enter into the manufacture and sale of dipsticks which infringed patent No. 2,534,644 would be considered to be an act of infringement and that Welch would enforce his patent against Grindle. Welch gave this notice to Grindle during a conference between Grindle and Welch (TR. 166). Welch admitted on cross-examination that it was logical to assume that he would object to Grindle's manufacturing and selling dipsticks of the type shown in drawing D-32.061.14 (TR. 630).

Appellant, in his Opening Brief, on page 12, admits that all of his remarks have been directed against the Complaint as originally filed, and that he has ignored the Amended and Supplemental Complaint filed by Appellee. Appellee respectfully submits that it is the Amended and Supplemental Complaint which should be considered rather than the Complaint as originally filed. As pointed out above, the Amended and Supplemental Complaint clearly sets forth facts which constitute a justiciable controversy. The error, if any, in the District Court finding that there was a justiciable controversy between the parties at re

me of filing the original Complaint is cured by the Amended and Supplemental Complaint.

Under the rules, if Appellee's original Complaint had been dismissed for the lack of a justiciable controversy, Appellee clearly would have had the right to file another complaint as soon as a justiciable controversy had arisen. Therefore, Appellant's statement that "Appellee's conduct after March 27, 1955, was self-serving and ineffectual as a curative" is without basis. From the Federal Rules, it is clear that the facts which existed at the time of the filing of the Amended and Supplemental Complaint must be the facts which are to be considered in determining whether there was a justiciable controversy between the parties. Otherwise, the filing of an Amended and Supplemented Complaint would be of no value. Certainly, the Federal Rules would not spell out a procedure for a useless act.

**B. APPELLEE'S CLAIM FOR RELIEF CLEARLY
WAS NOT A STALE CLAIM.**

Appellee fails to understand point No. II of Appellant's argument. It would seem that on the one hand the Appellant is arguing that there was no justiciable controversy between the parties (Appellant's point I) and on the other hand, he is arguing that Appellee's claim for relief was a stale claim (Appellant's point II). These two contentions are diametrically opposed to each other. An action for declaratory relief cannot be brought until a justiciable

controversy has arisen and until a justiciable controversy arises, a claim for relief cannot become *stale* (Appellant's term).

A justiciable controversy clearly did not arise until the conference which took place in the offices of Fleish and Swain (TR. 166) in the early part of 1955. The Complaint was filed March 25, 1955. There was surely a short time between the time when the justiciable controversy arose and the filing of the Complaint, but there can be no question of a stale claim.

Appellant has apparently confused the issue of whether or not Appellee could bring a claim for relief under the Declaratory Judgments Act together with the non-federal questions which were in the Complaint such as the claims for assignment of the patent and damages. These latter claims may have involved the question of whether or not they were barred by laches. However, since these latter questions have not been appealed by Appellee, they need not be considered by this Court.

Since Grindle could not bring suit to have patent No. 2,534,644 held invalid until a justiciable controversy arose between the parties there can be no question of laches in this case. The facts that the patent issued on December 19, 1950, and that Grindle did not have actual notice of the patent until September 28, 1953 are not controlling.

**C. THE LETTER OF JUNE 10, 1948, DID NOT
GRANT ANY PATENT RIGHTS.**

Appellant *relies greatly upon* the wording in the letter of June 10, 1948, in which Grindle released the dipstick design to the Plastic Process Company to market as it saw fit. Welch had asked for such a release and it was only given because it was Grindle's belief that Pan American would receive a price consideration (TR. 136).

Appellant makes the assertion that Grindle knew that, under Pan American policy, Pan American owned any asserted invention in the subject dipstick to the extent of Appellee's participation in the conception and making of it, and knew that Pan American would continue to own it until Appellee imported it to grant a release of it, such as the one he obtained some six years later (Defendant's Exhibit A). There is no support whatsoever for this statement in the record. In fact, it is well established that under the policy of Pan American, the invention belongs to the employee and the company has no interest except a shop right in such inventions (TR. 138). Grindle merely obtained the release at request of counsel to clarify any questions which might arise (TR. 225).

Appellant also makes the unsupported statement that if Appellee had no intention of dealing or conveying any possible rights he himself might have had, he had the duty at that time to reserve those personal rights by language inserted in the release or set up in some separate paper delivered to Appellant.

It is untenable that anyone could construe the letter of June 10, 1948, as granting any patent rights to Welch. Certainly the letter of June 10, 1948, could not be construed to give Welch the right to file a patent application in his own name on the very invention which Grindle had disclosed to him.

In addition, it is submitted that Welch could claim no rights under the letter of June 10, 1948, because the release was given to the Plastic Process Company rather than to Welch as an individual. Welch was not an employee of the Plastic Process Company but was something akin to a manufacturer's agent (TR. 60). Welch, therefore, could not claim any rights under the Plastic Process Company.

The letter of June 10, 1948, cannot be relied upon for another reason, in that there had been a total failure of consideration. Welch failed to live up to the price concessions that had been promised Pan American and, therefore, the release is no longer in effect. Welch, for that reason, cannot rely upon this letter to maintain that Appellee is estopped to maintain its claim for relief.

**D. WELCH WAS NOT THE TRUE INVENTOR
OF THE DIPSTICK.**

The adjudication that Welch was not the true inventor was not clearly erroneous.

Appellant in this section (Section IV) of his brief tries to leave the impression that Grindle devised the type of dipstick and uses the word "concept" to de-

pe this type, and that Welch devised, patented and exploited another type of dipstick. Such is not the case, as is clear from the facts.

In the Statement of Facts in this brief, Sections I.B. and II.C., the various steps through which Grindle passed in developing the dipstick, including the production of drawing D-32.061.114, were given.

Appellant throughout his brief erroneously assumes that Grindle's development of the dipstick ceased with the making of a mock-up dipstick (a replica of which is represented by Plaintiff's Exhibit 5), and the preparation of the extrusion drawing (Plaintiff's Exhibit 6) whereas, as a matter of fact Grindle continued with the development of the dipstick and prepared drawing D-32.061.114. As also pointed out in Appellee's Statement of Facts, it was Grindle's invention which was disclosed in drawing D-32.061.114 and certainly not Welch's. If anyone made a contribution toward the commercial embodiment of the dipstick shown in drawing D-32.061.114, it was Kerr, who suggested the use of standard extrusions in place of the special extrusion proposed by Grindle. Welch cannot even claim that he contributed the use of laminated end plugs which are shown in the patent because that suggestion was made to him by Rollins.

Appellant in his Opening Brief on pages 22, 23 and 24 makes a comparison between Claims 1, 2 and 3 of the patent and what he assumes was Grindle's invention. This is misleading because Grindle's final development of the dipstick is shown in drawing D-32.061.114 and not in drawing A-14.123.116 and the mock-up

model (a replica which is shown by Plaintiff's Exhibit 5).

Claim 1 of the patent reads directly on the dipstick shown in Grindle's drawing D-32.061.114 as shown below.

CLAIM 1

	Grindle's Drawing D-32.061.114
A liquid measuring gauge comprising	
a tubular body of transparent material	Yes
a reinforcing bar within said body and	Yes
having grooves therein and	Yes
graduated scales on opposite sides	
of said grooves;	Yes
transparent measuring tubes within	
said grooves	Yes
with their opposite ends extending	
beyond the length of the body; and	Yes
plugs in the opposite ends of and her-	
metically sealing the ends of said	
body against the entrance of liquid	
within said body surrounding said	
measuring tubes.	Yes

Claim 2 also reads directly on the dipstick shown in the drawing except for the fact that it calls for limited end plugs. The same is true for Claim 3 except in addition it calls for nails extending through the plugs and penetrating the ends of the reinforcing bar.

*With the exception that the tubes only extend out of one end of the body.

These variations are minor details of construction and as expressed by Judge Murphy in his Memorandum Opinion (TR. 59) "were changes of a sort which any mechanic, in or out of the plastic field might have developed in the course of construction."

Appellant's comparison of a Grindle device with Claims 1, 2 and 3 of the patent is also misleading in that Grindle's mock-up dipstick (a replica of which is shown in Exhibit 5) discloses the use of graduated scales and also discloses the use of transparent measuring tubes. The measuring tubes were incorporated in the tubular body.

Appellant in his Brief also tries to give the impression that Grindle's development of a dipstick was merely an idea. It is uncontradicted that Grindle developed certain working models, for example, the mock-up dipstick (a replica of which is shown in Plaintiff's Exhibit 5), and tested them and found them operable.

Appellant passes off lightly the fact that he patented Grindle's invention. Appellant then states that if the patentee has neglected to credit one with inventive contribution of the order that should have caused him to be included as a joint-inventor, the patent statutes plainly make provision for such a contingency." Appellant, however, fails to point out that the statute only makes provision for such a contingency where the joint-inventor was omitted by error and without deceptive intention on the part of the patentee. This is exactly the opposite of the present case in which Welch intended to claim the invention as his own and

falsely swore under oath that he was the true inventor.

E. THE DIPSTICK WAS IN PUBLIC USE.

Grindle clearly established that the first dipsticks delivered by Welch on August 12, 1948, were placed in public use well before August 17, 1948, more than one year before the Welch application for patent was filed on August 17, 1949. Welch himself searched the records of Pan American (surreptitiously without Grindle's knowledge) (TR. 49) and found that there was no doubt that he had delivered his first production dipsticks on August 12, 1948. Claim 1 read directly on the dipsticks which were publicly used and is clearly invalid. Welch himself must have been of this opinion because he filed a disclaimer to Claim 1 (TR. 496-498). Claims 2 and 3 also read directly on the dipsticks placed in public use except for minor details. (See this brief, Section V.)

Judge Murphy properly denied the Appellant's Motion to Reopen the Case for Further Evidence. See the Affidavits of Welch and Burke (TR. 25 and 32) in which Appellant attempts to question the public use established by Grindle and corroborated by Plaintiff's Exhibits 16 and 17. The Affidavits of Elijah V. Frost, Paul S. Stensen, John E. Davidson and Eugene L. Grindle (TR. 37-53) clearly explain any questions raised by the Affidavits of Welch and Burke. The Affidavits explain that no significance can be attached to the fact that the earlier dated receiving report carried a higher serial number than the later dated receiving report.

In addition, the motion to reopen the case was properly denied because the evidence which Appellant sought to introduce was not what is normally termed "newly discovered evidence". "Newly discovered evidence" has been defined as "evidence of facts existing at the time of trial of which the aggrieved party was excusably ignorant" *United States v. Bransen* (C.C.A. 91944), 142 F.2d 232.

All of the allegedly newly discovered evidence which Appellant sought to have entered in the case would have been available to Appellant before or during trial if he had made a diligent search for it. The serial numbers of the receiving reports were apparent and the fact that the earlier dated receiving report carried a serial number higher than that of the number of the later receiving report could have been ascertained. The evidence contained in the Affidavit of Francis J. Burke could also have been obtained by Appellant before or during trial. Appellant makes no contention that this evidence could not have been obtained before or during trial of the present action had the Appellant been diligent in attempting to procure the same.

It is well established that a motion for reopening a case will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after trial would have produced it had it been exercised prior thereto. *United States v. Bransen*, supra. Appellant is also required to rebut the presumption that there had been lack of diligence. *United States v. Bransen*, supra.

Appellant's motion to reopen the case also must be denied because the alleged newly discovered evidence

would not produce a different result in the case *United States v. Bransen*, supra; *Eastern Airlines U. S.* (D.C. Del., 1953), 110 F.Supp. 499. At best, the alleged newly discovered evidence is merely cumulative as to the evidence already in the case and is insufficient to warrant reopening the case. *Kitchart Metropolitan Life Insurance Co.* (C.C.A. 8, 1941), 11 F.2d 497.

**F. PATENT NO. 2,534,644 IS INVALID OVER GRINDLE'S
DRAWING D-32.061.114.**

Grindle's drawing D-32.061.114 can be used to show that Patent 2,534,644 is invalid on the ground that it does not define invention over the drawing. The drawing was submitted to Welch with the letter of June 10, 1948 (Exhibit 12), and is therefore clear that Welch had knowledge of the subject matter of this drawing well before he filed the application for patent.

**G. PATENT NO. 2,534,644 DOES NOT DEFINE INVENTION
OVER THE PRIOR ART.**

Appellant quotes from Grindle's testimony in which Grindle stated that the "dipstick is still a good functional device. To date, I haven't seen anything better." It is only natural for Grindle to make this laudatory statement since he himself was the inventor of the dipstick. The mere fact that it is a good, functional device does not mean that the device arises to the dignity of an invention.

Appellant's comparisons of the claims of the Welch patent with the Hyde and Schmitt references do not give the Hyde and Schmitt references proper credit.

Hyde and Schmitt both disclose a liquid measuring gage which includes a reinforcing bar (the square rod 1 in Hyde, supports 18 in Schmitt) the reinforcing bar having grooves therein (the grooves in the rod B in Hyde, the viewing slots 20 between the supports 1 in Schmitt), graduated scales (on the rod B in Hyde and on the supports 18 in Schmitt) and a transparent measuring tube (tube A in Hyde, and the tube 11 in Schmitt).

From Appellant's analysis of the Hyde and Schmitt patents, one would erroneously be led to believe that none of these elements shown in the Hyde and Schmitt patents form a part of the dipstick disclosed in the Welch patent.

In addition to the elements listed above, both the Hyde and Schmitt patents show to be old the idea of raising a liquid column by means of a hollow transparent tube and reading the height of the column on a properly calibrated scale adjacent the measuring tube. In view of these facts, it is submitted that it was not clearly erroneous for the Honorable Edward L. Murphy to decide that the variations in construction shown in patent No. 2,534,644 over that shown in Hyde and Schmitt were merely mechanical expedients and did not represent a significant advance in the art.

H. APPELLEE IS NOT GUILTY OF LACHES.

Appellee submits that the question of laches is not before the court in view of the fact that Appellee's appeal from the decision of the District Court has been dismissed with his consent. Certainly Appellant can-

not contend that the question of laches arises with respect to the action by Grindle to have the patent No. 2,534,644 held void and invalid. Appellee had the right to bring suit under the Declaratory Judgment Act until a justiciable controversy had arisen. The claim for relief was filed a very short time after the justiciable controversy arose.

**I. APPELLANT SHOULD NOT BE AWARDED
ATTORNEYS' FEES.**

Appellant's argument in connection with attorneys' fees is irrelevant in view of the fact that Grindle's action to have patent No. 2,534,644 held void and invalid was obviously not a stale claim. Certainly in view of the unconscionable conduct of Appellant in patenting Grindle's invention, it cannot be contended that Grindle's action was vexatious and unjustified.

**J. THE DISTRICT COURT'S ORDER REQUIRING APPELLANT
TO DISCONTINUE THE PATENT MARKING OF THE DEVICES
AND TO NOTIFY CUSTOMERS WAS PROPER.**

The action of the District Court in ordering Welch to discontinue marking of the devices with the patent number and to notify his customers that the dipsticks were not patented was proper. The District Court refused to give Grindle an assignment of the patent and the damages he requested (TR. 59-60) but held that some relief should be given Grindle to equalize his business opportunity with that of Welch (TR. 63). The relief given by the court is just in view of the fact that the patent is void and invalid. Since

the patent is void and invalid, the subject matter disclosed therein is in public domain. Customers for the disticks have a right to receive this information.

IX. CONCLUSION.

From the foregoing, it is respectfully submitted that the Court of Appeals must affirm the judgment of the District Court because the findings of the District Court are supported by the evidence and are not clearly erroneous.

The patent No. 2,534,644 is void and invalid on four separate and independent grounds any one of which is sufficient.

We believe that this Court must adopt the findings of the Learned Trial Judge, Edward P. Murphy, who had the opportunity to see the witnesses and to determine their credibility.

Dated, San Francisco, California,
September 27, 1957.

Respectfully submitted,

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(Appendix Follows.)



Appendix.



Appendix

EXHIBITS

Plaintiff's Exhibit No.	Brief Description of Exhibit	Page of Record Introduced in Evidence
2	Soft copy of Welch patent 2,534,644.....	
3	Dipstick formed by drilling a hole through solid 3/4" square plastic extrusion	90
4	Sketch of mock-up dipstick	94
5	Replica of mock-up dipstick	97
6	Pan American drawing A.14.123.116 dated April 28, 1948 prepared by Grindle.....	99
7, 7b, 7c	Examples of standard plastic extrusions sub- mitted by Welch	105
8	Pan American drawing D-32.061.114 showing the "A" change	110
9	Replica of dipstick submitted by Welch.....	121
10	Quotation by Welch dated June 7, 1948 on dipsticks for Pan American	128
11	Pan American Purchase Order No. 30-3017541 dated June 11, 1948	131
12	Original of Grindle letter dated June 10, 1948	135
13	Pan American copy of Grindle letter dated June 10, 1948	135
14	Pan American letter written by Grindle to Division Operation Managers dated June 14, 1948	140
15	Pan American letter written by Grindle to all Station Operation Managers at Pan American dated June 22, 1948	140
16	Pan American Receiving Report No. 49700 dated August 12, 1948.....	142
17	Pan American Receiving Report No. 49986 dated August 12, 1948	142
20	Letter dated February 10, 1949 from Welch to Pan American	152
21	Pan American letter dated February 25, 1949 written by Grindle to other Pan American divisions	155

Plaintiff's Exhibit No.	Brief Description of Exhibit	Page of Record Introduced in Evidence
22	Vibrometer manufactured by Deterjet Corporation	171
25	Montoya sketch of mock-up dipstick.....	267
34	Welch deposition	670
35	Plastic Process Company quotation dated May 11, 1948 to Pan American	592

Defendant's Exhibit No.	Brief Description of Exhibit	Page of Record Introduced in evidence
A	Pan American release to Grindle dated October 6, 1954	226
E	Letter dated May 3, 1948 from Welch to Plastic Process Company	371
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P	Pan American drawing D-32.061.114 before "A" change	441
Q	Bill from Shaffer's Mill	458
T	Letter dated June 28, 1948 from Plastic Process Company to Welch	464
H-1	Welch patent application file	494
R-1	Welch drawing dated May 12, 1948	554

*Indicates introduced for purpose of identification only.

No. 15540

In the
United States Court of Appeals
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C. MARTIN WELCH,

Appellant,

vs.

EUGENE L. GRINDLE,

Appellee.

Appellant's Reply Brief

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In the

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Appellee.

Appellant's Reply Brief

There is no necessity for, nor does space permit, a word for word reply to Appellee's Brief. Appellee is held up as a paragon of virtue and his claim of inventorship is represented as being so well authenticated as to preclude the necessity of looking at both sides of the case, but Appellee overlooks a number of factors which water down or completely refute his contentions.

It will therefore, be the purpose of this brief to point out the absence of substance in several of Appellee's basic arguments advanced in his Brief. The remaining points were covered in Appellant's Opening Brief and need not be reargued here.

Appellee Fails to Bridge the Gap Between His Impracticable Concept of a Dipstick and the Device of the Welch Patent and Hence His Claim of Inventorship Falls to the Ground.

It is argued (Appellee's Brief pages 18-19; 70-74) that Grindle *redesigned* the Dipstick to incorporate the use of standard plastic extrusions and that, for this reason, Welch was not the true inventor of the subject matter of his patent.

It is undisputed, of course, that Grindle had a "concept of a dipstick and that drawing A-14.123.116 (Plaintiff Exhibit 6) and the replica model (Plaintiff's Exhibit 5) disclose this impracticable structure. We say impracticable because it called for an extrusion that could not be economically made. That concept is wholly different from the device that forms the subject matter of the Welch Patent, as was demonstrated in Appellant's Opening Brief (pages 20-28). Appellee uses drawing D-32.061.114 (Plaintiff's Exhibit 8) in an effort to show that Grindle kept on going with his so-called inventive work and that drawing D-32.061.114 discloses the ultimate end of his asserted acts of invention.

This places a considerable strain on the facts. Drawing D-32.061.114 (Plaintiff's Exhibit 8) was made by the draftsman (Chong) under Grindle's instructions *after* Welch had called on Grindle to report his findings with respect to the impractical extrusion device and had disclosed to him the basic elements of a practical device (TR. 104-109). At the time Mr. Welch was possessed of knowledge imparted to him by Mr. Kerr as to what the basic, desirable components of the improved dipstick should be. It is not strange, therefore, that Grindle was able to cause Chong to produce a drawing which embraced the basic components of the dipstick that was finally adopted.

A significant fact is that the original of Pan Am drawing D-32.061.114 (Plaintiff's Exhibit 8) was made on Vellum paper in pencil and was amended from time to time, according

ing to established practice, to incorporate changes in the structure (TR. 275-277). Other changes were made in the basic Vellum drawing to conform to the device produced by Mr. Welch (TR. 447-450; Defendant's Exhibit P).

Great store is put upon the fact by Appellee that Grindle is named on drawing D-32.061.114 (Plaintiff's Exhibit 8) as the designer of the dipstick shown thereon. It is submitted that there is no fetish in the word "design" and its presence on the drawing does not aid Grindle in his claim that he invented that which is shown thereon. It was a word of his choice and it was within his power to employ it. If it fed his ego to place it there, or to indicate to his employer that he had carried out his assignment, that would still not vary the controlling facts.

Thus here Appellee confuses his *adoption* of ideas conveyed to him by Appellant as to how a practical dipstick might be made, with the act of invention. Grindle's inventive work ceased with his disclosure of the impracticable extrusion device to Welch (Plaintiff's Exhibit 6). From then on he merely embraced or adopted the inventive work of Welch and was content to use it in carrying out the project assigned him by his employer, Pan American.

Welch's So-called Price Agreement with Grindle and/or Pan American Is Immaterial to the Issues of This Case.

Grindle's argument that a so-called "price agreement" or the asserted violation of it supports his case borders on the fantastic.

It is true, of course, that Welch and Grindle (as the agent of Pan American and not in his individual capacity) agreed on a price to be charged Pan American for the Dipsticks made by Welch. This much is shown by Plaintiff's Exhibit 1 wherein the price is specified at \$3.25 each (Cf. Plaintiff's Exhibit 13 wherein the price was approximated at \$3.00 each).

For purposes of argument, we may assume also that Welch was making a price concession to get or land an order and that this may have figured in the giving of the release of June 10, 1948 (Plaintiff's Exhibit 12). But does that mean, as Appellee, in effect, argues, that Welch was forever after obligated to maintain the initial price regardless of all other considerations, such as universally accepted cost increases, in order to retain the benefits of the release? The answer is obviously in the negative and spelled out in the record itself.

In the first place, it was conceded by Appellee that the release contained no such terms or terminology (TR. 13). In the second place, Grindle, acting as the agent of his employer, and Pan American, acting independently of Grindle, *renegotiated* the price of the dipsticks with Welch from time to time (TR. 149-152; Plaintiff's Exhibit 20; TR. 164).

Thus, Grindle and Pan American approved all price increases for the Dipsticks and may not now be heard to say that there was any breach or violation by Welch of a "pre-agreement". The facts of the case plainly puncture Appellee's argument (Brief, p. 70) that there was a total failure of consideration for the release.

But lurking in the background of all this is the peculiar argument that in some inexplicable fashion Grindle's case here is fortified or strengthened by the Welch-Pan American price relations on Dipsticks. The total immateriality of that facet is so obvious as to preclude any necessity for theorizing with Appellee as to how or why he should be able to improve his position by referring to it.

Appellee's Attempt to Spell Out a Justiciable Controversy Buries on the Ridiculous.

Appellee argues (Brief pages 46-48 and 63-67) that the formation of an intent to manufacture and sell dipsticks,

thus what he says he had done by the time of trial, as set forth in the original complaint and the amended and supplemental complaint, gave rise to a controversy justiciable under the Declaratory Judgment Act. But when the several acts are considered separately and collectively, they do not measure up to the requirements of the Statute.

The best that Appellee can make out is the creation of the appearance of an intent to do something. Not that he intended doing it, but rather he would declare that it was his state of mind to take a few faltering steps toward infringement of the Welch patent. Here Grindle entertained the mistaken belief that mere *advisory opinions* are obtainable under the Declaratory Judgment Act.

As part of this mummary at creating the appearance of justiciable controversy, the final bit of sleight-of-hand was the giving by Grindle to his corporation (Deterjet Corporation) of an oral *license* to manufacture and sell dipsticks. "license" based on what? Grindle was not vested with any patent rights relative to a dipstick because he had long since abandoned any and all claims by his admitted failure to file and process an application on that which he claims he developed. If the so-called "license" was predicated upon the Pan American release of October 6, 1954 (Defendant's Exhibit A), it was put upon form without substance, because Grindle and Pan American had both long since abandoned the very subject matter of such release.

So also the other "acts" enumerated by Appellee, at page 3 of his Brief, will not bear scrutiny because, at most, they merely represent a series of motions at preparation for a journey never taken.

Under these circumstances, it is respectfully submitted that the District Court lacked jurisdiction because there was no such justiciable controversy between the parties as was

cognizable under the Declaratory Judgment Statute an Appellant's Motion to Dismiss made at the conclusion of the Appellee's case on such grounds (TR. 356-364) should have been granted.

The Broad Aspects of the Case Suggest that Appellee Brought His Action Out of Spite and Point Up the Fact That, as a Standalone Claim, It Should Have Been Dismissed.

Appellee's claim was put upon the dual ground that the Welch patent should be assigned to him or be declared invalid. The District Court decided against him on the first point and for him on the second, despite the absence of a showing of the existence of a *bona fide*, justiciable controversy. When the case is looked at in its broad aspects and its objectives are weighed, one is prompted to inquire why the action was commenced and so vigorously prosecuted.

Grindle and Welch were friends (TR. 198; 506-507; 686-691). In the period of their friendship an invention came into being and Grindle personally authored a release (Plaintiff's Exhibit 12) of the invention from Pan American to Welch (and impliedly from Grindle) to market the device as Welch saw fit. Welch, in reliance on the release, established a business. At the time of his preparation of the release, Grindle attached no significance or importance to the presence or absence of an invention or the fact that a patent might eventuate. He chose to remain silent on the matter of the assertion of a claim of patent rights either on behalf of himself or his employer. Instead, he stood by and watched Welch's business grow and had knowledge and chargeability of knowledge that Welch had applied for and was granted Letters Patent on the device.

Following a period of years (1948-1953) Grindle was galvanised into action by his discovery, so he says, that Welch had obtained a patent. From a state of complete indifference to the commercial fate of the Dipstick, Grindle sprang to demand an assignment of the patent to him, regardless of whether it was invalid, as he now so vehemently declares. Failing in that, Grindle, with the aid of his counsel, began the performance of a series of provocative acts designed to stir up a mock controversy that might lead to the destruction of that which he had coveted but could not attain, namely, title to the Letters Patent in suit.

Appellee's case does not ring true. It has every appearance of a spite action and shows a "dog-in-the-manger" attitude that should have failed to elicit sympathy. Indeed, the action should have been thrown out as one rooted in a stale claim.

It is respectfully submitted that it would be fitting and proper for this Court to remand the case to the District Court with directions to dismiss it for lack of jurisdiction of a genuine justiciable controversy.

CONCLUSION

For the reasons advanced in this and Appellant's Opening Brief, it is respectfully submitted that the Court should reverse the judgment of the District Court as one based upon clearly erroneous findings, with directions to dismiss Appellee's stale claim for lack of jurisdiction.

Respectfully submitted,

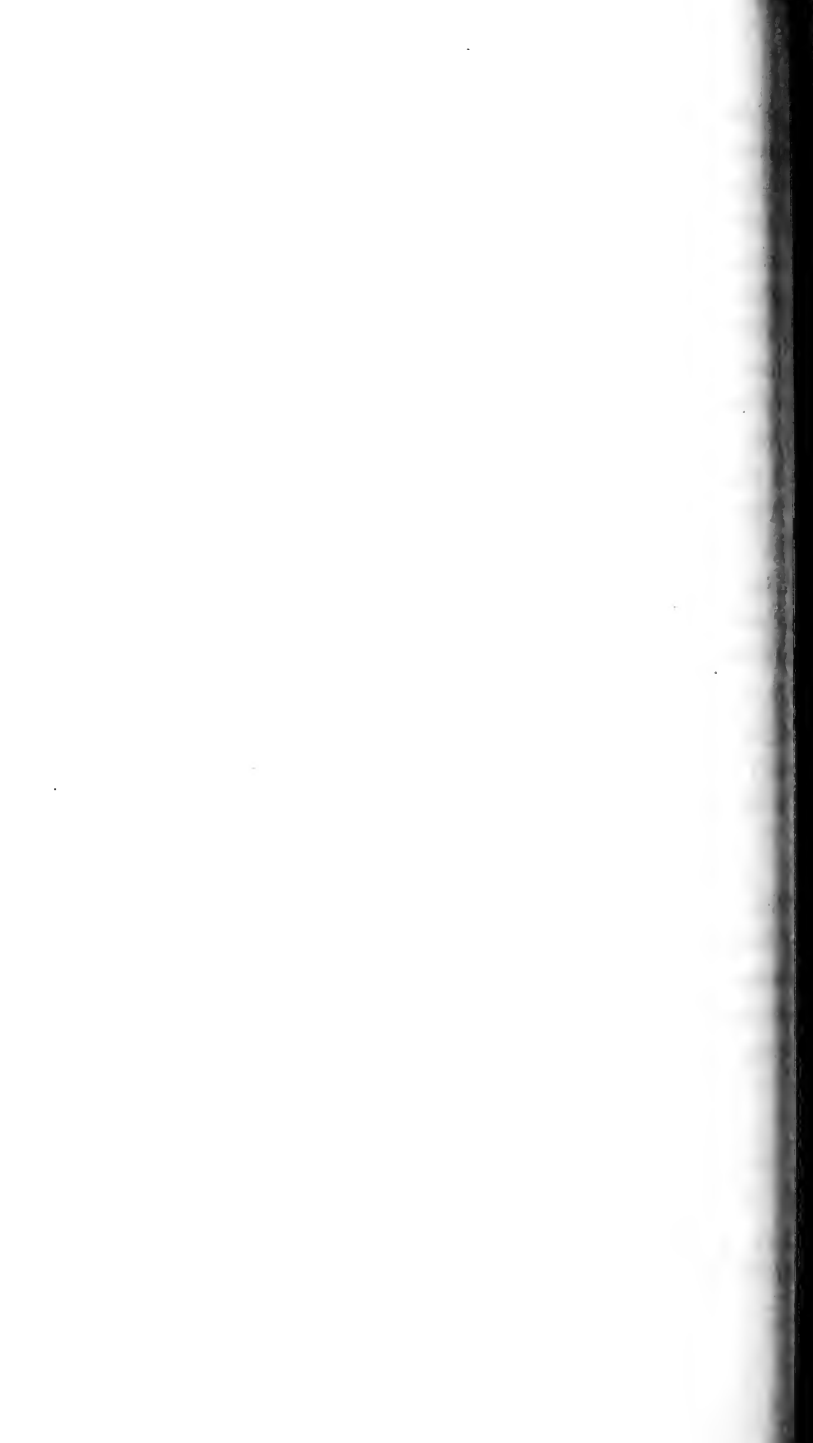
NAYLOR & NEAL

By JAS. M. NAYLOR

Counsel for Appellant

FRANK A. NEAL

Of Counsel



No. 15541

**United States
Court of Appeals**
for the Ninth Circuit

BANK OF NEVADA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Nevada**



No. 15541

**United States
Court of Appeals**
for the Ninth Circuit

BANK OF NEVADA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Nevada**

NAMES AND ADDRESSES OF ATTORNEYS

MILTON W. KEEFER,
Suite 15-17 Cornet Bldg.,
Fourth and Fremont,
Las Vegas, Nevada,
For the Appellant.

CHARLES K. RICE,
Assistant U. S. Attorney General;

ELLIS N. SLACK,
Attorney, Department of Justice,
Washington 25, D. C.;

FRANKLIN P. RITTENHOUSE,
United States Attorney,
P.O. Box 1589,
Reno, Nevada;

GODFREY MUNTER,
Special Attorney,
Internal Revenue Service,
San Francisco, California,
For the Appellee.

In the United States District Court
for the District of Nevada

No. 135

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BANK OF NEVADA,
Defendant.

COMPLAINT

The United States of America, Plaintiff, by its attorney, Franklin P. R. Rittenhouse, United States Attorney for the District of Nevada, alleges the following:

I.

This action has been authorized by the Commissioner of Internal Revenue of the United States and is brought under the direction of the Attorney General of the United States.

II.

This action arises under the Act of June 25, 1948, c. 646; 62 Stat. 933; U.S.C., Title 28, Sec. 1345, as hereinafter more fully appears.

III.

Defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Las Vegas, Nevada. [2*]

IV.

On or about November 15, 1954, withholding and Federal Insurance Contributions Taxes for the calendar year 1954 in the principal amount of \$804.50 were assessed against J. D. Bentley, hereinafter referred to as taxpayer. A Notice of Federal Tax Lien pertaining to this assessment was filed with the Office of the County Recorder, Clark County, Nevada, on January 12, 1955.

V.

On or about March 1, 1955, Excise Taxes for the calendar year 1954 in the principal amount of \$187.51 were assessed against taxpayer. A Notice of Federal Tax Lien pertaining to this assessment was filed with the Office of County Recorder, Clark County, Nevada, on June 13, 1955.

VI.

Subsequent to the assessments referred to above the District Director of Internal Revenue gave notice to and made demand upon taxpayer for payment of such taxes, but taxpayer refuses to pay such taxes.

VII.

On June 10, 1955, the taxpayer had on deposit in an account with the defendant bank the sum of not less than \$878.16.

VIII.

On June 10, 1955, a Notice of Levy, for the assessments described above plus statutory addition, in the total amount of \$1,069.70 and a Warrant for

Distrainment were served upon the Bank of Nevada, 102 Fremont Street, Las Vegas, Nevada.

IX.

On June 14, 1955, a Final Demand for payment of the [3] above-described Notice of Levy was served upon the Bank of Nevada, 102 Fremont Street, Las Vegas, Nevada.

X.

The defendant refuses to surrender the balance due in the taxpayer's bank account as of June 10, 1955, to the District Director of Internal Revenue, thereby rendering itself liable to the United States for such amount under the provisions of Section 6332 of the Internal Revenue Code of 1954 (26 U.S.C., Sec. 6332).

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$878.16 together with costs and interest as allowed by law, and for such further relief to which it may be justly entitled.

/s/ FRANKLIN P. RITTENHOUSE,
United States Attorney.

[Endorsed]: Filed Sept. 28, 1955. [4]

[Title of District Court and Cause.]

ANSWER

I.

Referring to Paragraphs I and II of Plaintiff's Complaint, Defendant alleges that it is without sufficient information or knowledge to form a belief as to the allegations contained therein.

II.

Defendant admits all of the allegations contained in Paragraph III of Plaintiff's Complaint on file herein.

III.

Referring to Paragraphs IV, V and VI of Plaintiff's Complaint, Defendant alleges that it is without sufficient information or knowledge to form a belief as to the allegations contained therein.

IV.

Defendant admits the allegations contained in Paragraphs VII, VIII, IX and X of Plaintiff's Complaint on file herein.

Affirmative Defense

I.

Defendant on or about June 10, 1955, and prior thereto, was the owner and holder of a demand note dated April 16, 1955, in the principal sum of

2,000.00, with interest thereon at the rate of six per cent (6%) per annum, upon which there was due and owing a balance in the sum of \$1,500.00, together with accrued interest, a copy of which is attached hereto marked Exhibit A and thereby made a part hereof.

II.

Defendant on or about February 28, 1955, and on or about [5] May 31, 1955, entered into written agreements with J. D. Bentley, its depositor and the taxpayer named in Plaintiff's Complaint, forming a part of said depositor's financial statement, which said agreements provided that in the event any deposit account of said depositor or any other property held by Defendant should be attempted to be obtained or held by writ of execution, garnishment, attachment, or other legal process, then all of the obligations of said depositor to the Defendant, at the option of Defendant, would become immediately due and payable without demand or notice. Copies of said agreements are attached hereto marked Exhibits B and C, respectively, and thereby made a part hereof.

III.

Defendant on June 10, 1955, exercised its lien or right of set-off against said depositor, J. D. Bentley, pursuant to the said demand note and said agreements, hereinabove described, and thereby set off or credited against said note the sum of \$878.16 which said depositor had on deposit in an account with Defendant.

Wherefore, Defendant prays that Plaintiff take nothing by reason of its Complaint herein and the judgment be entered accordingly for Defendant.

/s/ MILTON W. KEEFER,

Attorney for Defendant Bank
of Nevada.

[No exhibits to be printed.]

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 8, 1955. [6]

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled action having come on regularly for pretrial hearing on April 27, 1956, and the parties having appeared by their respective counsel of record; and the court having jurisdiction of both the subject matter and the parties; and the parties having advised the court that a complete agreement had been reached with respect to the material and relevant facts and that this agreement would be presented to the court in the form of a stipulation of facts and attached exhibits; and the parties having filed herewith such a stipulation with exhibits "A" through "H" attached, it is hereby ordered

1. That the stipulation of facts, with Exhibits "A" through "H" attached thereto, presents all

the factual data which the parties consider to be necessary to decision and that no further factual data will be adduced by the parties except upon request by the court. [7]

2. That, in accordance with the understanding reached at the hearing, this controversy involves conflicting claims to the sum of \$878.16 which sum was on deposit in the taxpayer-debtor's checking account with the defendant when plaintiff on June 10, 1955, served a levy upon the defendant. Whether defendant is liable to plaintiff for this sum is the only issue here and the decision of that issue depends upon whether defendant's claimed right of set-off is superior to the rights of the plaintiff based on its lien and levy.

3. That the parties, within 60 days from the date of entry of this order, will submit briefs on the issue framed above and that thereafter, upon notification by the court, will present oral arguments in support of their contentions.

Dated Aug. 28, 1956.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed Aug. 28, 1956. [8]

Title of District Court and Cause.]

STIPULATION OF FACTS

1. This is a civil action for the collection of taxes; jurisdiction over this suit is granted by Sec-

tions 1340 and/or 1345 of Title 28, United States Code. This suit has been authorized by the Commissioner of Internal Revenue of the United States and has been brought under the direction of the Attorney General of the United States.

2. The defendant is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Las Vegas, Clark County, Nevada.

3. On November 15, 1954, certain Withholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of \$804.50 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the taxpayer. Thereafter, and on November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

4. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance [9] Contributions Act taxes was filed in the Office of the County Recorder, Clark County, Nevada. A copy of this notice is attached hereto and marked Exhibit "A."

5. On February 28, 1955, and on August 3, 1954, the taxpayer submitted to the Bank of Nevada financial statements, copies of which are attached hereto and marked Exhibits "B" and "B-1," respectively.

6. On March 1, 1955, certain federal excise taxes for the calendar year 1954 in the amount of \$187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

7. On April 16, 1955, J. D. Bentley and his wife, Doris L. Bentley, borrowed two thousand dollars from the Bank of Nevada and executed a promissory note in favor of the bank for that amount. A copy of this note is attached hereto and marked Exhibit "C."

8. On May 31, 1955, the taxpayer submitted to the Bank of Nevada another financial statement, a copy of which is attached hereto and marked Exhibit "D."

9. On June 10, 1955, the taxpayer had on deposit in an account with the Bank of Nevada the sum of not less than \$878.16. A copy of the checking account maintained by the taxpayer under the name of Bentley's Trading Post showing the deposit of the loan proceeds on April 16, 1955, and other deposits and withdrawals for the period April 1, 1955, to September 6, 1955, is attached hereto and marked Exhibit "E." On that day (June 10, 1955), the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a Notice of Levy, Form 668-A, upon the Bank of Nevada by delivering it to E. K. Phillips, Assistant Cashier, at 1:45 p.m. This Notice of Levy covered both of the as-

sessments [10] referred to above together with statutory additions thereto; a copy of the Notice of Levy is attached hereto and marked Exhibit "F."

10. On that same day, A. M. Smith, Vice-president and Manager of the First and Fremont Branch of the Bank of Nevada, wrote to H. L. Collomb, collection officer, as follows:

"This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.

"I would like to take this opportunity to inform you that we have exercised our right to set off and applied the funds in this account to an unsecured indebtedness held at this bank consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in this letter was the balance of the note referred to above in paragraph seven, which, at the time of the levy amounted to approximately \$1,500.00.

11. On June 13, 1955, a notice of federal tax lien pertaining to the assessment of federal excise taxes was filed in the Office of the County Recorder Clark County, Nevada. A copy of this notice is attached hereto and marked Exhibit "G."

12. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a Final Demand, Form 668-C upon the Bank of Nevada by delivering it to A. M. Smith, Vice-President and Manager of the First

Fremont Branch of the Bank of Nevada, at 11:10 a.m. A copy of this demand is attached hereto and marked Exhibit "H."

13. This suit was commenced in the United States District Court for the District of Nevada on September 28, 1955.

Date: August 16, 1956.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney, and
HOWARD W. BABCOCK,
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,
Attorneys for Plaintiff.

Date: August 28, 1956.

/s/ MILTON W. KEEFER,
Attorney for Defendant. [11]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION

It is hereby stipulated and agreed by the undersigned counsel of record for the Plaintiff and Defendant, that the following statement is true and should be added to the stipulation of facts filed on August 28, 1956, as paragraph 10a:

The Bank of Nevada did, on the 10th day of June, 1956, subsequent to 1:45 p.m. of said day, exercise its right of set-off and applied the funds in this account to the taxpayers' unsecured indebtedness referred to in the Stipulation of Facts on file herein.

Date: Oct. 29, 1956.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney, and

HOWARD W. BABCOCK,
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,
Attorneys for Plaintiff.

Date: Oct. 2, 1956.

/s/ MILTON W. KEEFER,
Attorney for Defendant.

[Endorsed]: Filed Nov. 7, 1956. [12]

[Title of District Court and Cause.]

OPINION, FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The case was submitted upon stipulation of facts together with attached exhibits and supplemental stipulation filed November 7, 1956. The parties are in agreement as to the questions presented for determination; viz.:

1. Whether the defendant was in possession of property of the delinquent taxpayer which was subject to the tax lien sought to be levied against said bank deposits of the taxpayer, and

2. Whether a Federal tax lien on the bank account of a delinquent taxpayer is superior to the claimed right of set-off in the Bank by virtue of the taxpayer's note to the Bank executed after the tax lien arose, or by virtue of an agreement between the Bank and the taxpayer contained in a financial statement executed with the Bank before the tax lien arose.

However, the Bank's contentions are largely based upon its assumption that the taxpayer's note was payable at any time without demand.

In *United States v. Graham, et al.*, 96 F. Supp. 318, 320, affirmed, *State of California, et al., v. United States*, 9 Cir., 195 F. 2d 530, Judge Harrison held:

"[4-6] The contention that there is no property against which the plaintiff's tax liens may be fore

closed is without support. 'Congress [90] intended to subject all of the taxpayer's property, except that specifically exempt to the payment of taxes. "Property" is a word of very broad meaning and when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things. "Property" within the tax laws should not be given a narrow or technical meaning.' *Citizens State Bank of Barstow, Texas, v. Vidal*, 10 Cir., 114 F. 2d 380, 382. * * *

"[7] There yet remains the question of whether or not the state may set off against its debt to the taxpayer the taxes owed by the taxpayer to the state. It is unquestioned that under Secs. 3672 and 3710(a), Title 26, U.S.C.A., the rights of the Collector do not extend beyond those of the taxpayer whose right to property is sought to be levied upon. *U. S. v. Winnett*, 9 Cir., 1947, 165 F. 2d 149. If the state had a right of set-off against the taxpayer prior to the United States' asserted lien and priority, the Collector would be bound to recognize the right of the state to set off.

"[8] The 1942 income tax assessment against the taxpayer, Warren C. Graham, was received by the Collector on March 23, 1945, more than a year and three months before the leases with the State of California were entered into. The tax due under this assessment is still due. Any money that accrued to the taxpayer under the lease with the state accrued with a lien impressed upon it. There was no

period of time in which the State of California's right of set-off could have been asserted against the debt to the taxpayer that the property was not impressed with the tax lien. In *U. S. v. Winnett*, supra, the right of set-off accrued before any tax liens arose."

The sum of \$878.16 on deposit with defendant Bank in the account of the taxpayer was, at the time of the service of Notice of Levy by the District Director of Internal Revenue, property of Bentley, the taxpayer.

The financial statements, Exhibits "B" and "B-1," executed prior to the loan evidence by the note of April 16, 1955, each contained the following:

"The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsements, guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change [91] in said financial condition, and also agrees that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent, or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be at

tempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then, and in such case, at your option, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a continuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary."

Upon the above-quoted paragraph of the financial statements and the note of April 16, 1955, the Bank bases its claimed right of set-off. The note provided that:

"On Demand; if no demand is made then on August 14th, 1955, for value received, I promise to pay in lawful money of the United States of America, to the order of the Bank of Nevada * * * Two Thousand and no/100 Dollars. * * *"

"Although the maker of a demand note is not in default until he refuses payment until after demand therefor, it is generally held that a note payable on demand is due immediately, so that suit may be maintained on it at any time after delivery without any other demand than the suit. This rule may not

apply, however, where there is something on the paper or in the circumstances under which it was given to show that it was not the intention that it should become due immediately."

—10 C.J.S. 744, § 247b;

Sullivan v. Ellis,

8 Cir., 219 F. 696, citing 7 Cyc. 848, 849.

From the above-quoted portion of the note it appears that it was not the intention of the payee or the maker of the note that the same was to be due immediately upon delivery. It was the evident intention of the parties that the note was to become due August 14, 1955, unless in the meantime a formal demand by the Bank for payment was [92] made.

Defendant Bank, in its brief, states:

"* * * the bank had a right of set-off and thereby a lien upon any funds of the taxpayer on deposit with it, which arose prior in time to the date of November 15, 1954, which was the date upon which the tax lien arose. This lien of the bank was created by virtue of the financial statement dated August 31, 1954 (Exhibit B-1), wherein the bank was given the right by the depositor to apply any and all funds against any and all indebtedness of the taxpayer-depositor without demand and without notice to the taxpayer-depositor when and as certain conditions existed or came into being which jeopardized the claim of the bank under its promissory de

mand note, and which materially changed the taxpayer's-depositor's financial condition."

On June 10, 1955, the taxpayer had on deposit with defendant Bank in a checking account the sum of \$878.16. On November 15, 1954, Withholding and Federal Insurance Contribution Act taxes for the calendar year 1954 in the amount of \$804.50 were assessed against the taxpayer. On March 1, 1955, Federal Excise taxes for the calendar year 1954, in the amount of \$187.51, were assessed against the taxpayer.

On June 10, 1955, the District Director of Internal Revenue caused to be served upon the Bank a Notice of Levy covering both of the assessments. As has been noted, at the time of the service of the levy, no part of the obligation secured by the note was due and no contention is made that at that time the taxpayer was insolvent.

Therefore, the principles stated in the following quotation can have no application here:

"The propriety of allowing the offset is at once apparent, and, in view of the fact that the lessor had become insolvent, it is immaterial that under the terms of the lease the return of the deposit was not yet due. In *City Investment Company v. Pringle*, 73 Cal. App. 782, 239, P. 302, the court reviewed the authorities relating to set-offs against insolvent debtors, and there said at page 791 of 73 Cal. App., 239, P. 302, 306, '* * * insolvency itself is a sufficient ground for the application of equita-

ble set-off, and the fact, that the indebtedness on one side is not due when set-off is claimed, constitutes no obstacle to the assertion of the right as against an insolvent, debtor.' "

—Gordon v. Foote,

Cal. App., 7 P. 2d 709, 710. [93]

On the same day, June 10, 1955, after service of the levy, the Bank attempted to exercise its claimed right of set-off of the balance remaining unpaid on the note against the \$878.16 on deposit to the credit of the taxpayer. From Exhibit "E" it appears that for the period beginning April 1, 1955 to September 6, 1955, the Bank accepted taxpayer's deposits and honored his withdrawals. The exhibit indicates substantial withdrawals by depositor for several months after the claimed right of set-off.

The Federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of setoff on the part of the Bank, if such right existed.

The Court's attention has been called to § 873, Nev. Comp. Laws, 1929, which is as follows:

"Every garnishee shall be allowed to retain and deduct out of the property, effects, or credits of the defendant in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are due at the time due or not, * * *."

That this state law cannot give superiority to the Bank's claimed right of setoff over the pre-existing liens is made apparent by Mr. Chief Justice Stone in *Michigan v. United States*, 317 U.S. 338, 340, where he stated:

"We do not stop to inquire whether this construction of the state statutes is the correct one, for we think the argument ignores the effect of a lien for federal taxes under the supremacy clause of the Constitution. The establishment of a tax lien by Congress is an exercise of its constitutional power 'to lay and collect taxes.' Article I, § 8 of the Constitution. *United States v. Snyder*, 149 U. S. 210. And laws of Congress enacted pursuant to the Constitution are by Article VI of the Constitution declared to be 'the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.'

"'It is of the very nature and essence of a lien, that no matter into whose hands the property [94] goes, it passes cum onere.' * * * Hence, it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision. *United States v. Snyder*, supra; *United States v. Greenville*, 118 F. 2d 963."

Even if any rights the Bank might have had under the Nevada statute had the dignity of a lien,

no right under that statute could displace the prior tax liens existing here.

On June 10, 1955, and prior thereto, the amount on deposit to the credit of Bentley was burdened with the prior existing Federal tax liens. On that date Bentley was solvent and the note of April 16, 1955, had not matured and would not become payable prior to August 14, 1955, in the absence of a demand. In the face of these facts, the Bank had no right to setoff and apply the funds in Bentley's account on the promissory note.

Upon the stipulation of the parties, the Court finds:

Findings of Fact

1. This is a civil action for the collection of taxes; jurisdiction over this suit is granted by §§ 1340 and/or 1345 of Title 28, U.S.C.A. This suit has been authorized by the Commissioner of Internal Revenue of the United States and has been brought under the direction of the Attorney General of the United States.

2. The defendant is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Las Vegas, Clark County, Nevada.

3. On November 15, 1954, certain Withholding and Federal Insurance Contributions Act taxes for the calendar year 1954 in the amount of \$804.00 were assessed against J. D. Bentley of Las Vegas, Nevada, hereinafter referred to as the [95] ta-

payer. Thereafter, and on November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

4. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance Contributions Act taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "A."

5. On February 28, 1955, and on August 31, 1954, the taxpayer submitted to the Bank of Nevada financial statements, Exhibits "B" and "B-1," respectively.

6. On March 1, 1955, certain Federal Excise taxes for the calendar year 1954 in the amount of \$187.51 were assessed against the taxpayer, and on that same date the taxpayer was notified of this assessment and demand was made upon him to pay it, but he has refused to do so.

7. On April 16, 1955, J. D. Bentley and his wife, Doris L. Bentley, borrowed \$2,000 from the Bank of Nevada and executed a promissory note in favor of the Bank for that amount, Exhibit "C."

8. On May 31, 1955, the taxpayer submitted to the Bank of Nevada another financial statement, Exhibit "D."

9. On June 10, 1955, the taxpayer had on deposit in an account with the Bank of Nevada the sum of not less than \$878.16, Exhibit "E." On that day,

June 10, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Notice of Levy, Form 668-A, upon the Bank of Nevada by delivering it to E. K. Phillips, Assistant Cashier, at 1:45 p.m. This Notice of Levy covered both of the assessments, referred to in Findings Nos. 3 and 6, together with statutory additions thereto, Exhibit "F."

10. On that same day, A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada, [96] wrote to H. L. Collomb, Collection Officer, as follows:

"This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.

"I would like to take this opportunity to inform you that we have exercised our right to setoff and applied the funds in this account to an unsecured indebtedness held at this bank; consequently, there are no funds available under your levy."

The "unsecured indebtedness" referred to in this letter was the balance of the note referred to above in Finding No. 7, which, at the time of the levy, amounted to approximately \$1,500.

11. The Bank of Nevada did, on the 10th day of June, 1955, subsequent to 1:45 p.m. of said day, exercise its "claimed" right of setoff and applied the funds in this account to the taxpayer's unsecured indebtedness.

12. On June 13, 1955, a notice of Federal tax lien pertaining to the assessment of Federal Excise taxes was filed in the Office of the County Recorder, Clark County, Nevada, Exhibit "G."

13. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, Collection Officer, served a Final Demand, Form 668-C, upon the Bank of Nevada by delivering it to A. M. Smith, Vice-President and Manager of the First and Fremont Branch of the Bank of Nevada, at 11:10 a.m., Exhibit "H."

Conclusions of Law

The Court concludes:

1. That plaintiff's tax liens are paramount and valid liens and that plaintiff is entitled to judgment in the amount of \$878.16 plus legal interest and costs as provided by § 6332, Internal Revenue Code, 1954, 26 U.S.C.A., § 6332.

The plaintiff, United States of America, shall submit [97] a form of judgment to the Court for approval.

Dated: This 14th day of March, 1957.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 14, 1957. [98]

In the United States District Court
for the District of Nevada

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BANK OF NEVADA,
Defendant.

JUDGMENT

This matter having been submitted to the Court upon a stipulation of facts together with attached exhibits and a supplemental stipulation; and the arguments of counsel having been heard; and the Court having made its findings of fact and conclusions of law, now makes its judgment.

It Is Hereby Ordered, Adjudged, and Decreed that the Bank of Nevada, defendant herein, pay to the plaintiff herein, United States of America, the sum of \$878.16, together with interest thereon at the rate of 6 per centum per annum from June 10 1955, to the date of entry of this judgment and plaintiff's costs incurred herein.

Dated this 29th day of March, 1957.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed March 29, 1957. [99]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Bank of Nevada, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 29th day of March, 1957.

/s/ MILTON W. KEEFER,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1957. [100]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant, Bank of Nevada, designates the following portions of the record, constituting the entire record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint on file herein.
2. Defendant's Answer to Complaint on file herein.
3. Pretrial Order, dated August 28, 1956.
4. Stipulation of Facts, entered the 28th day of August, 1956, together with the Supplemental Stipulation entered the 29th day of October, 1956.
5. Exhibit A, Exhibit B, Exhibit B1, Exhibit C,

Exhibit D, Exhibit E, Exhibit F, Exhibit G and Exhibit H.

6. Brief for the Plaintiff. [103]
7. Brief for the Defendant.
8. Plaintiff's Supplemental Citations.
9. Defendant's Reply to Plaintiff's Supplemental Citations.
10. Transcript of Oral Argument of January 17, 1957.
11. Opinion, Findings of Fact and Conclusion of Law, filed March 14, 1957.
12. Judgment, entered March 29, 1957.
13. Notice of Appeal, filed April 5, 1957.
14. This Designation of Record on Appeal.

Dated this 12th day of April, 1957.

/s/ MILTON W. KEEFER,

Attorney for Appellant, Bank
of Nevada.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1957. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby

certify that the attached and accompanying documents are the originals filed in this Court, or true and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant, and that they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 24th day of April, 1957.

[Seal] OLIVER F. PRATT,
Clerk;

By /s/ RAY MONA SMITH,
Deputy Clerk. [105]

[Endorsed]: No. 15541. United States Court of Appeals for the Ninth Circuit. Bank of Nevada, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 26, 1957.

Docketed: May 2, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15541

BANK OF NEVADA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION

It is hereby stipulated and agreed by and between the Appellant, Bank of Nevada, and the Appellee, United States of America, that there be deleted from the Record on Appeal in the above-entitled action the following, which were designated in the Designation of Record on Appeal, filed April 12, 1957, with the Clerk of the United States District Court:

6. Brief for the Plaintiff.
7. Brief for the Defendant.
8. Plaintiff's Supplemental Citations.
9. Defendant's Reply to Plaintiff's Supplemental Citations.
10. Transcript of Oral Argument of January 11, 1957.

Dated: May 1, 1957.

FRANKLIN RITTENHOUSE
United States Attorney, and

HOWARD W. BABCOCK,
Assistant U. S. Attorney;

By /s/ HOWARD W. BABCOCK,
Attorneys for Appellee.

/s/ MILTON W. KEEFER,
Attorney for Appellant.

[Endorsed]: Filed May 4, 1957.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Points upon which Appellant intends to rely on in this Appeal are as follows:

1. That the Court erred in finding the Plaintiff's tax liens were paramount and valid liens.
2. The Court erred in finding the sum on deposit with the Defendant Bank in the account of the taxpayer was, at the time of the service of Notice of Levy by the District Director of the Internal Revenue Bureau, property of Bentley, the taxpayer.
3. The Court erred in finding that it was the intention of the parties that the Note was to become due August 14, 1955, unless in the meantime a final demand by the Bank for payment was made.
4. The Court erred in finding that at the time of the service of the Levy, no part of the obligation secured by the Note was due.

5. The Court erred in finding that on June 10, 1955, and prior thereto, the amount on deposit to the credit of taxpayer,

6. The Court erred in finding that the federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of setoff on the part of the Bank.

7. The Court erred in not finding that the Bank had a right of setoff and applying the funds in Bentley's, the taxpayer's, account on the Promissory Demand Note then due and owing to the Bank

8. The judgment entered pursuant thereto is contrary to law.

9. The judgment entered pursuant thereto is contrary to the evidence.

MILTON W. KEEFER, and
MAHLON B. BROWN,

By /s/ MILTON W. KEEFER,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1957.

Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
ON APPEAL

Appellant, Bank of Nevada, designates the following portions of the record, constituting the entire record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint on file herein.
2. Defendant's Answer to Complaint on file herein.
3. Pretrial Order, dated August 28, 1956.
4. Stipulation of Facts entered the 28th day of August, 1956, together with the Supplemental Stipulation entered the 29th day of October, 1956, together with all Exhibits attached thereto marked Exhibits "A" through "H," inclusive.
5. Opinion, Findings of Fact and Conclusions of Law, filed March 14, 1957.
6. Judgment, entered March 29, 1957.
7. Notice of Appeal, filed April 5, 1957.
8. Stipulation eliminating Briefs and Citations for Plaintiff and Defendant and transcript of oral argument of counsel from the Record on Appeal.
9. The Designation of Record on Appeal, filed April 12, 1957, with the Clerk of the United States District Court for the District of Nevada.

10. The Appellant's statement of points upon which he intends to rely.

11. This Designation of Record on Appeal.

Dated this 3rd day of May, 1957.

MILTON W. KEEFER, and
MAHLON B. BROWN,

By /s/ MILTON W. KEEFER,
Attorneys for Defendant-
Appellant, Bank of Nevada

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1957.





No. 15,541

IN THE

United States Court of Appeals
For the Ninth Circuit

BANK OF NEVADA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

APPELLANT'S BRIEF.

MILTON W. KEEFER,

. MAHLON BROWN,

Cornet Building, Las Vegas, Nevada,

Attorneys for Appellant

Bank of Nevada.

FILED

AUG - 6 1957

PAUL P. O'BRYEN, CLERK



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No. 15,541

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BANK OF NEVADA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court
for the District of Nevada.**

APPELLANT'S BRIEF.

JURISDICTION.

Jurisdiction of the District Court in this case is based on Secs. 1340 and/or 1345 of Title 28 U.S.C.A. It was alleged in the complaint (R. 3) that this action was authorized by the Commissioner of Internal Revenue of the United States and was brought under the direction of the Attorney General of the United States.

That the defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Las Vegas, Nevada (R. 3).

Jurisdiction of this court on appeal is based upon its statutory appellate jurisdiction 28 U.S.C.A. 1291, and the timely invocation, by appellant, of the prescribed procedure (Rule 73, Fed. Rules Civ. Proc.; R. 45-52).

STATEMENT OF CASE.

On August 31, 1954, the delinquent taxpayer, John D. Bentley, also known as J. D. Bentley, of Las Vegas, Nevada, had prepared and executed a financial statement (R. 17-18) with the defendant, Bank of Nevada, which statement was also signed by an officer of the Bank of Nevada, and which statement contained an agreement between the taxpayer and the bank providing in substance that the taxpayer, for the purpose of procuring funds from the bank by promissory notes and otherwise, furnished said statement and agreed that in the event of any material change in the financial condition of said taxpayer, or if any deposit account of the taxpayer should be attempted to be obtained or held by writ of attachment, garnishment or other legal process, then in such a case, at the option of the bank, all obligations of the taxpayer to the bank or held by the bank should immediately become due and payable without demand or notice. This agreement provides specifically that it is a continuing statement of the taxpayer-depositor until terminated in writing.

Thereafter, on November 15, 1954, certain withholding and Federal Insurance Contribution Act taxes

he amount of \$804.50 were assessed against J. D. Bentley, the taxpayer referred to herein, and on January 12, 1955, a notice of tax lien was properly recorded with the County Recorder of Clark County, State of Nevada (R. 14).

Thereafter, on February 28, 1955, the taxpayer executed and filed with the bank a new financial statement, (R. 15-16) which contained an agreement identical in all respects with the financial statement executed and filed with the bank on August 31, 1954.

On March 1, 1955, federal excise taxes in the amount of \$187.51 were assessed against the taxpayer, and a notice of tax lien pertaining to the assessment was filed with the office of the County Recorder of Clark County, State of Nevada, on June 13, 1955 (R. 29).

On April 16, 1955, the taxpayer and his wife executed a promissory demand note in favor of the bank for the sum of \$2,000.00, which sum was deposited to the taxpayer's account on the same date (R. 22). The note provided for payment of the principal sum "on demand; if no demand is made then on August 14, 1955" (R. 19).

On May 31, 1955, the taxpayer executed and deposited with the bank a third financial statement (R. 20-21) identical in all respects with the two previous financial statements filed with the bank except as to the sums or amounts contained therein representing the taxpayer's assets and liabilities, but containing the same agreement giving the bank a right of set off

as contained in the original statement of August 31 1954.

On June 10, 1955, the taxpayer had on deposit to his account with the defendant, Bank of Nevada, the sum of \$878.16 (R. 26) which was the then existing balance in his commercial account with said bank. On that date, the District Director of the Internal Revenue served a notice of levy (R. 28) upon the defendant at 1:45 P.M. of said day, and thereafter the bank exercised its right of set off under the terms of the agreement with the taxpayer-depositor (R. 17-18) and under the terms of the promissory demand note (R. 19), and charged off the sum of \$878.16 against the taxpayer's account leaving no balance on deposit as of that date (R. 26). Upon the same date, June 10, 1955, the defendant, by its Vice-President and Manager, wrote a letter to the collection officer, who had served the notice, which acknowledged receipt of the notice of levy and informed the collection officer that the bank had exercised its right of set off and had applied the funds in the taxpayer's account to an unsecured indebtedness held by the bank, and that there were no funds available under the tax levy (R. 12).

The "unsecured indebtedness" referred to by the bank was the balance due upon the promissory demand note referred to above which, at the time of the levy, amounted to \$1,500.00 (R. 12).

Thereafter, on June 14, 1955, the District Director of Internal Revenue served a final demand upon the bank, as required by the Internal Revenue Code 194 (R. 12-13).

On March 14, 1957, the trial court, after submission of briefs and oral argument, found that the plaintiff's tax liens were paramount and valid liens and that plaintiff was entitled to judgment in the amount of \$878.16 plus legal interest and costs as provided by Section 6332 Internal Revenue Code 1954, 26 U.S.C.A. 6332 (R. 32-43).

On March 29, 1957, judgment for plaintiff was entered in the above amount (R. 44).

SUMMARY OF ARGUMENT.

As the argument will disclose, the principal difficulty or questions involved in this case results from the refusal of the trial court to find that the agreement contained in the financial statement between the taxpayer-depositor and the appellant bank (R. 17 and 18) created a right in the bank to set off against the deposit any indebtedness owing by the depositor to the bank, which right of set off was paramount to the government's subsequent tax lien. Further, the record discloses that the bank was the holder of a demand note executed by the taxpayer-depositor, which, being a matured indebtedness, could be charged against the taxpayer's deposit at any time. Finally, the trial court refused to recognize that as a result of the paramount right in favor of the bank to set off the taxpayer's indebtedness against the deposit the bank was not in possession of any property of the taxpayer subject to the tax levy.

SPECIFICATION OF ERRORS.

1. The opinion of the trial court and the judgment entered thereon (R. 32-44) are contrary to law and are not supported by the evidence.

2. The trial court erred in finding the sum on deposit with the defendant bank in the account of the taxpayer was, at the time of the service of notice of levy by the District Director of the Internal Revenue Bureau, property of Bentley, the taxpayer (R. 34).

3. The trial court erred in finding that it was the intention of the parties that the note was to become due August 14, 1955, unless in the meantime a formal demand by the bank for payment was made (R. 36).

4. The trial court erred in finding that at the time of the service of the notice of levy, no part of the obligation secured by the note was due (R. 37).

5. The trial court erred in finding that on June 10, 1955, and prior thereto, the amount on deposit to the credit of taxpayer, Bentley, was burdened with the prior existing tax liens (R. 40).

6. The trial court erred in finding that the federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan on April 16, 1955, and prior to any right of set off on the part of the bank (R. 38).

7. The trial court erred in finding the plaintiff's tax liens were paramount and valid liens (R. 43).

ARGUMENT.

THE TRIAL COURT ERRED IN IGNORING THE ESTABLISHED PRINCIPLE THAT THE BANK HAS A GENERAL LIEN OR RIGHT OF SET OFF AGAINST THE DEPOSITS OF THE DEPOSITOR FOR THE INDEBTEDNESS OF THE DEPOSITOR TO THE BANK.

It is the general rule that the relationship between bank and its depositor is that of debtor and creditor. When a deposit is made upon a general account, such deposit becomes a part of the general funds of the bank, with title thereto having passed to the bank subject to the use of the depositor (*Michie on Banks and Banking*, Vol. 5A, Chapter 9, Sections 1 and 4b; *United States Fidelity, etc., Co. v. First Nat. Bank*, 72 F. (2d) 258; *Ex Parte Rickey*, 31 Nev. 82, 100 P. 134; *McStay Supply Co. v. Cook & Co.*, 35 Nev. 34, 132 P. 545). It is also well accepted that the general rule that a bank has a general lien upon or right of set off against all monies or funds in its possession belonging to a depositor to secure the payment of a depositor's indebtedness to it is a part of the law merchant and well established in commercial transactions (*Michie on Banks and Banking*, Vol. 5A, Chapter 9, Section 114).

Such a right can be further implemented by specific agreement between the bank and depositor as will be seen from the subsequent argument herein and as prescribed by the case of *Updike v. Manufacturers Trust Co.*, 243 App. Div. 15, 275 NYS 716, and the case of *United States v. Winnett*, 165 F. 2d 149. This right of the bank to set off the deposit against indebtedness owing from the depositor to the bank does

not depend upon the existence of a lien in its favor on deposited funds, but on the principle that the balance due between the parties is thus ascertained (Michie on Banks and Banking, Vol. 5A, Chapter 9 Section 114, pages 276-277; 7 Am. Jur., Sections 629 630.)

It is, therefore, the contention of appellant that it had a right to set off by virtue of a specific agreement with its depositor, as shall be hereafter set forth in the argument and by virtue of a demand promissory note which was a matured obligation owing to Appellant from the taxpayer-depositor, and that only the sum left, after deducting the debits from the credit in favor of the depositor was the balance or property subject to the tax lien.

THE TRIAL COURT ERRED IN FINDING THE PROMISSORY NOTE WAS NOT A DEMAND NOTE AND DUE IMMEDIATELY UPON DELIVERY.

The trial court found that the promissory note involved in this matter was not an obligation due and payable without a formal demand by the appellant bank upon the depositor for payment of the note. This conclusion is based primarily upon the writing which appears upon the face of the note, on demand, "if no demand is made then on August 14, 1955" (R. 1-35-36). Appellant believes that this conclusion of the trial court is against the law and the evidence, in addition to being contrary to the intentions of the parties at the time the said note was executed.

The rule now generally adopted regarding a demand promissory note is that a promissory note payable on demand becomes due and payable upon delivery, and the statute of limitations begins to run thereon from the date of its execution, and not from the time of demand, as payment can be immediately demanded and an actual demand is not necessary to complete the cause of action (8 Am. Jur., Section 278).

There is a conflict of authority regarding the proposition set forth in the trial court's opinion that when there is something on the paper or in the circumstances under which a note was given to show that it was not the intention of the parties that it should become due immediately that the note does not mature immediately (R. 35-36). The Appellant believes that the better view is that a note such as the one involved in this case is a demand note and becomes due and demandable immediately after its delivery or at any event not later than the date stated therein (R. 19).

The important thing to consider is when the note matures. Maturity means the time when the note becomes due and demandable, or the time when an action can be maintained thereon to enforce payment (*Booling v. Springer*, 30 A. 2d 466, 3 Terry 228).

The words "on demand" serve the same purpose as words making the instrument payable at a specified time, simply fixing the maturity of the obligation, and do not make a demand necessary, but mean that the instrument is due, payable, and matured when made

and delivered (*Grigg v. Middle States Utilities Co. of Delaware*, 293 N.W. 66, 228 Iowa 933).

A note containing the words "payable on demand after date" at the bottom of which appeared "due July 5, 1920" was held to be a demand note due and payable immediately (*Miners State Bank v. Anksztokalnys*, 128 A. 726, 283 Pa. 18). In another case, a note containing the words "on demand on or before September 15, 1902 after date", was held to be a demand note and due and payable immediately (*Alaska-North American Trading etc. Co. v. Byrne*, Alaska 26).

The appellant believes that if all the evidence and circumstances regarding the relationship of the bank and the depositor are considered, including the agreement contained in the financial statement given to the bank by the depositor (R. 17-18), it will clearly show that as between the bank and the depositor the intention of the parties was to make the note payable immediately without the necessity of any formal demand for payment being first made by the bank.

THERE WAS NO PROPERTY OF THE DEPOSITOR-TAXPAYER IN THE POSSESSION OF THE APPELLANT SUBJECT TO THE TAX LIEN.

The Internal Revenue Code of 1954, Section 6321 (a) provides:

"Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall,

upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property rights as is, at the time of such demand, subject to an attachment or execution under any judicial process."

It is the contention of appellant that it did not have in its possession "property rights to property subject to levy" at the time of demand or levy by the District Director of Internal Revenue on June 10, 1955 (R. 1-12, Paragraphs 9 and 10).

By reason of appellant's right of set off based upon the agreement with the bank (R. 17-18) and the demand note (R. 19), and recognizing the fact that the bank and its depositor stood in the position of debtor and creditor, there existed no balance in the depositor-taxpayer's account which was subject to levy by the District Director of Internal Revenue.

It is unquestioned that the rights of the District Director of Internal Revenue do not extend beyond those of the taxpayer whose right to property is sought to be levied upon (*United States v. Winnett*, 165 F. 1 149; *United States v. Bank of United States*, 5 F. Supp. 942).

Hence, it is the contention of appellant that although a bank deposit is property or a right to property which is subject to levy for an existing tax lien owed to the government, nevertheless the relationship between the appellant bank and the taxpayer-depositor must be examined closely and their accounts balanced

in order to determine whether there exists any credit in favor of the taxpayer which would constitute property subject to levy. Here no such credit existed.

THE RIGHT OF SET OFF IN THE APPELLANT WAS PARAMOUNT TO THE GOVERNMENT'S TAX LIEN.

It is the contention of appellant that by virtue of the agreement contained in the financial statement executed by the appellant and the taxpayer-depositary (R. 17-18), which was executed on August 31, 1954, prior to the assessment of taxes against the taxpayer on November 15, 1954, or the recording of the notice of tax lien on January 12, 1955 (R. 10, Paragraphs 3 and 4; R. 14), that this gives the appellant a right of set off by contract which was paramount to the subsequent tax lien (*Updike v. Manufacturers' Trust Co.* (1934) 243 Appellate Division 15, 275 NYS 716, cert. den. 296 U.S. 648, 80 L. ed. 461, 56 S.Ct. 308) which case cites *Wright v. Seaboard Steel and Manganese Corp.*, 272 F. 807; and *Edwards v. Sterling National Bank and Trust Co.*, 5 F. Supp. 925).

In the recent case of *United States v. Winnet*, supra, it was held that an agreement creating the right of set off entered into prior to the creation of a tax lien gave the parties who had the right of set off a priority over the subsequent lien for delinquent taxes, and that the equitable right of set off relates back to the date of the agreement, and the court further held that the rights of the government cannot rise above the rights of the taxpayer sought to be levied upon.

In the case of *Updike v. Manufacturers Trust Co.*, supra, it was held that the bank properly set off against the deposit, the note of the depositor which was not due for eleven days, under the provisions of an agreement contained in the financial statement of the depositor.

It is the further opinion of the appellant that to hold otherwise than the foregoing decisions would in-
fringe upon the rights of a bank and its depositor to
enter in the usual and normal every day commercial
banking transactions, to engage in the normal banking
business of loaning money upon the assurance that the
depositor will maintain some credits in the bank to
secure his indebtedness, and would completely nullify
well established principles of commercial law.

CONCLUSION.

For the reasons stated herein, appellant respectfully submits a decree should issue, setting aside and reversing the opinion and judgment of the lower court entered therein.

Dated, July 31, 1957.

MILTON W. KEEFER,
B. MAHLON BROWN,
Attorneys for Appellant
Bank of Nevada.



No. 15,541

IN THE

United States Court of Appeals
For the Ninth Circuit

BANK OF NEVADA,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

On Appeal from the Judgment of the United States
District Court for the District of Nevada.

BRIEF FOR THE APPELLEE.

CHARLES K. RICE,

Assistant Attorney General.

LEE A. JACKSON,

L. F. PRESCOTT,

SHELDON I. FINK,

Attorneys, Department of Justice,

Washington 25, D. C.

FRANKLIN P. R. RITTENHOUSE,

United States Attorney.

HOWARD W. BABCOCK,

Assistant United States Attorney.

FILED

SEP - 6 1957

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Sec. 6332 (26 U.S.C. 1952 ed., Supp. II, Sec. 6332)	1, 7, 12, 14, App. ii, iii
Sec. 7851 (26 U.S.C. 1952 ed., Supp. II, Sec. 7851)	App. iii
28 U.S.C., Section 1291	2
28 U.S.C., Sections 1340 and/or 1345	2

No. 15,541

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BANK OF NEVADA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the Judgment of the United States
District Court for the District of Nevada.**

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The opinion, findings of fact and conclusions of law of the District Court (R. 32-43) are not officially reported.

JURISDICTION.

This appeal (R. 45) involves the application of the penalty provided in Section 6332 of the Internal Revenue Code of 1954 for the failure to surrender property subject to a levy. On June 10, 1955, the District Director of Internal Revenue served a notice

of levy upon the Bank of Nevada, in the amount of \$1,069.70, for income and excise taxes assessed against one J. D. Bentley. (R. 41-42; Ex. F, R. 28.) On June 14, 1955, the District Director served a final demand upon the Bank of Nevada. (R. 43; Ex. H, R. 30.) On September 28, 1955, the United States filed a complaint in the United States District Court for the District of Nevada, praying for judgment against the Bank of Nevada in the sum of \$878.16 together with interest as allowed by law. (R. 3-5.) On November 1955, the Bank of Nevada filed an answer to this complaint. (R. 6-8.) Jurisdiction was conferred on the District Court by 28 U.S.C., Sections 1340 and/or 1345. On March 29, 1957, the District Court entered judgment in favor of the United States. (R. 44.) The case is brought to this Court by a notice of appeal filed April 5, 1957. (R. 45.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether the District Court was correct in concluding that federal tax liens against a delinquent taxpayer's bank account were paramount and valid against an alleged right of set-off against the account asserted by the bank and that the bank, therefore, was in possession of property subject to a levy and was liable for the failure to surrender such property.

STATUTES INVOLVED.

The pertinent provisions of the Internal Revenue Codes of 1939 and 1954 are set forth in the Appendix, *infra*.

STATEMENT.

The facts as found by the District Court (R. 40-43) are entirely stipulated (R. 9-31) and may be summarized as follows:

On November 15, 1954, certain withholding and Federal Insurance Contribution Act taxes for the calendar year 1954 in the amount of \$804.50 were assessed against J. D. Bentley (hereinafter called taxpayer), of Las Vegas, Nevada. On November 16, 1954, taxpayer was notified of this assessment and demand was made upon him to pay it, but he refused to do so. On January 12, 1955, a notice of tax lien pertaining to this assessment of Withholding and Federal Insurance Contribution Act taxes was filed in the Office of the County Recorder, Clark County, Nevada. (R. 10, 40-41; Ex. A, R. 14.)

On February 28, 1955, the taxpayer submitted a financial statement to the Bank of Nevada (hereinafter called the Bank), which is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Las Vegas, Clark County, Nevada. (R. 10, 40-41.) In part, this financial statement (Ex. B, R. 15-16) stated (R. 15):

The undersigned, for the purpose of procuring and establishing credit from time to time with you and to induce you to permit the undersigned to become indebted to you on notes, endorsement guarantees, overdrafts or otherwise, furnishes the following as being a true and correct statement of the financial condition of the undersigned on the above date, and agrees to notify you immediately of the extent and character of any material change in said financial condition, and also agrees that if the undersigned, or any endorser or guarantor of any of the obligations of the undersigned, at any time fails in business or becomes insolvent, or commits an act of bankruptcy, or if any deposit account of the undersigned with you, or any other property of the undersigned held by you, be attempted to be obtained or held by writ of execution, garnishment, attachment or other legal process, or if any of the representations made below prove to be untrue, or if the undersigned fails to notify you of any material change as above agreed, then and in such case, at your option, all of the obligations of the undersigned to you, or held by you, shall immediately become due and payable, without demand or notice. This statement shall be construed by you to be a continuing statement of the condition of the undersigned, and a new and original statement of all assets and liabilities upon each and every transaction in and by which the undersigned hereafter becomes indebted to you, until the undersigned advises in writing to the contrary.

Earlier, on August 31, 1954, the taxpayer had submitted a financial statement on the same form. (R. 0, 41; Ex. B-1, R. 17-18.)

On March 1, 1955, certain federal excise taxes for the calendar year 1954 in the amount of \$187.51 were assessed against the taxpayer and, on that same date, the taxpayer was notified of this assessment and demand was made upon him to pay it, but he refused to do so. (R. 11, 41.)

On April 16, 1955, taxpayer and his wife borrowed 2,000 from the Bank and executed a promissory note in favor of the Bank for that amount. (R. 11, 41; Ex. C, R. 19.)

On May 31, 1955, the taxpayer submitted another financial statement to the Bank. (R. 11, 41; Ex. D, R. 20-21.)

On June 10, 1955, the taxpayer had on deposit in an account with the Bank the sum of not less than \$78.16. On that day, the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a notice of levy, Form 668-A, upon the Bank by delivering it to E. K. Phillips, assistant cashier, at 4:45 P.M. This notice of levy covered both of the assessments, together with statutory additions thereto. (R. 11-12, 41-42; Exs. E and F, R. 22-27, 28.)

On that same day, A. M. Smith, vice-president and manager of the First and Fremont Branch of the Bank, wrote to H. L. Collomb, collection officer, as follows (R. 12, 42):

This will acknowledge receipt of your Notice of Levy against J. D. Bentley, which was served on our Mr. Phillips at 1:45 p.m. today.

I would like to take this opportunity to inform you that we have exercised our right to set-off and

applied the funds in this account to an unsecured indebtedness held at this bank; consequently there are no funds available under your levy.

The "unsecured indebtedness" referred to in the letter was the balance of the note referred to above, which, at the time of the levy, amounted to approximately \$1,500. The Bank, subsequent to 1:45 p.m. on June 10, 1955, exercised its claimed right of set-off and applied the funds in the bank account to the taxpayer's unsecured indebtedness. (R. 12, 31, 42.)¹

On June 13, 1955, a notice of federal tax lien pertaining to the assessment of the federal excise taxes was filed in the Office of the County Recorder, Clark County, Nevada. On June 14, 1955, the District Director of Internal Revenue, through H. L. Collomb, collection officer, served a final demand, Form 668-1, upon the Bank by delivering it to A. M. Smith, vice-president and manager of the First and Fremont Branch of the Bank at 11:10 a.m. (R. 12-13, 43; Ex. G and H, R. 29, 30.)

On September 28, 1955, the United States brought the instant suit for collection. (R. 3-5.) On March 4, 1957, the District Court concluded, on the basis of the foregoing facts, that the tax liens were paramount and valid (R. 43) and, on March 29, 1957, the court entered judgment in favor of the United States in the amount

¹The bank statements of the checking account in question, maintained in the name of Bentley's Trading Post, indicate that there were substantial deposits and withdrawals for several months after the claimed right of set-off and that the Bank accepted these deposits and honored these withdrawals. (Ex. E, R. 22-27.)

f \$878.16, together with interest thereon (R. 44), whereupon the Bank brought this appeal. (R. 45.)

SUMMARY OF ARGUMENT.

Sections 6321, 6322, 6331 and 6332 of the Internal Revenue Code of 1954 provide that if any person liable to pay any tax neglects or refuses to pay the tax after demand, the amount of the tax becomes a lien in favor of the United States upon all property, whether real or personal; this lien arises at the time the tax is assessed and continues until the liability for the amount assessed is satisfied. If the taxpayer neglects or refuses to pay the tax after notice and demand is made upon him, the Government may levy upon all property and rights to property belonging to the taxpayer or on which there is a lien. The person who is in possession of property which is subject to levy shall, upon demand, surrender such property to the Government and, if such persons fails or refuses to do so, he is liable in his own person or estate to the United States in a sum equal to the value of the property (not to exceed the amount of the taxes for the collection of which the levy has been made).

It is well-established that a bank account is "property or rights to property" within the meaning of the foregoing statutory provisions. And it is clear from the facts of this case that, on June 10, 1955, the Bank of Nevada was in possession of a bank account belonging to the delinquent taxpayer upon which tax liens had attached on November 15, 1954, and March 1, 1955,

and which was therefore subject to levy. Demand was properly made upon the Bank on June 10, 1955, and the Bank refused to surrender the account, thereby becoming personally liable in a sum equal to the amount of the account, which did not exceed the amount of the taxes for which the levy was made.

The Bank contends, however, that it was not in possession of property of the taxpayer which was subject to levy at the time the levy and demand were made. This contention is based on the assertion that the Bank had a contractual right of set-off by virtue of an agreement set forth in a financial statement submitted to the Bank by the taxpayer on August 3, 1954, and an equitable right of set-off by virtue of a promissory note which was executed by the taxpayer on April 16, 1955, and that these rights of set-off were paramount to the Government's lien. The Bank then argues that, since the allegedly paramount right of set-off was greater than the bank account, there was no property of the taxpayer in its possession. This contention and the underlying assertions upon which it is based are not supported by the facts of this case or the law with respect thereto; the Bank could not immunize the account from the federal tax levy by an inchoate agreement with its depositor nor by an asserted equitable right of set-off arising from a debt which was not in existence at the time the tax lien arose.

The contractual right of set-off was clearly inchoate at all material times. The agreement amounted to nothing more than a potential right to set-off in the

event the taxpayer became indebted to the Bank and one of several contingencies set forth in the agreement occurred and the Bank exercised its option to set-off. The debt which the Bank is attempting to set off, pursuant to the agreement, did not even arise until after the tax liens attached. Furthermore, the only contingency which occurred to give the Bank its contractual option to set-off was the levy and demand and the option, accordingly, did not arise, and was not exercised, until *after* levy and demand. Indeed, it is not even clear that the Bank in fact exercised its option to set-off. The Bank is endeavoring to relate the asserted exercise of its contractual option to set-off back to the date of the original, inchoate financial statement, but the doctrine of relation-back cannot operate to preclude the Government from its right to levy on the bank account of the delinquent taxpayer, particularly where, as here, the debt arose after the tax liens attached and the option to set-off arose, and its exercise occurred, not only after the liens attached, but after the demand was made upon the Bank.

It is equally clear that the promissory note did not give rise to any equitable right of set-off which would defeat the Government's levy. Whether the note is deemed to be a demand note which was due on the date of its execution (April 16, 1955), as the Bank asserts, or whether the note was not due until August 1, 1955, in absence of a demand, as the District Court held, any equitable right of levy arose after the tax liens attached and such right was necessarily born with the liens impressed thereon. Furthermore, it does

not appear that such equitable right exists at all of the facts of this case. The mere fact that a note is due does not give rise to an equitable right of set-off. Such right does not exist in absence of facts which show that the maker cannot or will not pay or that the creditor has no practical legal remedy.

It might also be noted that the Bank's attempt to assert a right of set-off is tantamount to an assertion by the Bank of a prior lien. However, even if the question is viewed as one involving the priority of liens, it is clear that the tax liens were paramount. Accordingly, the Government's levy was valid and the Bank was required to surrender the bank account and be liable for its failure to do so. The cases upon which the Bank relies are distinguishable or inapplicable. Similarly, the Bank's closing argument that a decision against it infringes upon normal banking transactions and impairs the making of bank loans is without merit. The priority of the tax liens, the statutory right of levy, and the statutory liability of the Bank for failure to surrender the bank account are clear. There is nothing in the statute or decisions to indicate that banks are to be placed in any special position or are to be accorded any preferred treatment as compared with other types of creditors.

The decision of the District Court is correct and should be affirmed.

ARGUMENT.

THE DISTRICT COURT CORRECTLY HELD THAT CERTAIN FEDERAL TAX LIENS WERE PARAMOUNT AND THAT THE BANK WAS LIABLE FOR FAILING TO SURRENDER, AFTER LEVY AND DEMAND, A BANK ACCOUNT TO WHICH THE LIENS HAD ATTACHED.

The lien for federal taxes, and the provisions for the collection thereof, are entirely statutory and their scope and effect are to be determined solely by the statute and the decisions interpreting them. See *MacKenzie v. United States*, 109 F. 2d 540, 541 (C.A. 9th). The statute provides that, if any person liable to pay any tax neglects or refuses to pay the tax after demand, the amount of the tax becomes a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Sec. 6321 of the Internal Revenue Code of 1954 (Appendix, *infra*.) This lien is deemed to arise at the time the assessment is made and continues until the liability for the amount assessed is satisfied. Sec. 6322 of the Internal Revenue Code of 1954 (Appendix, *infra*.) If the person who is liable to pay the tax neglects or refuses to do so within ten days after notice and demand is made upon him, the Secretary of the Treasury) or his delegate, may collect such tax or levy upon all property and rights to property (with certain exceptions not pertinent here) belonging to such person or on which there is a lien. Sec. 6331 of the Internal Revenue Code of 1954 (Appendix, *infra*.) Upon such a levy, any person who is in possession of property or rights to property which are subject to the levy shall, upon demand, surrender such property or rights to the Secretary or his dele-

gate, unless the property is, at the time of demand subject to an attachment or execution under any judicial process. Any person who, upon demand, fails or refuses to surrender property or rights to property which is subject to levy is liable in his own person or estate to the United States in a sum equal to the value of the property not surrendered (not to exceed the amount of the taxes for the collection of which the levy has been made, together with costs and statutory interest from the date of the levy). Sec. 6332(a) and (b) of the Internal Revenue Code of 1954 (Appendix *infra*.) It is a well-established principle, which taxpayer does not dispute (Br. 7), that the word "property", as used in the statutory provisions set forth above, has a very broad meaning and includes obligations, debts owing to the taxpayer, and other intangibles, and that a bank account, being a debt of the bank to the depositor, is "property and rights to property" against which a lien may attach and a levy may be made under the statutes here involved. *United States v. Liverpool & London Ins. Co.*, 348 U.S. 21; *United States v. Eiland*, 223 F. 2d 118 (C.A. 4th; *United States v. Manufacturers Trust Co.*, 198 F. 2d 366 (C.A. 2d); *United States v. Long Island Drug Co.*, 115 F. 2d 983 (C.A. 2d); *MacKenzie v. United States*, *supra*. See also *Glass City Bank v. United States*, 326 U.S. 265. It is clear that the Bank was in possession of property belonging to a delinquent taxpayer and upon which a tax lien had attached and that this property was subject to levy. Demand was properly made upon the Bank and the Bank refused

to surrender the property. The Bank, pursuant to the foregoing statutory authority, was, accordingly, personally liable for its failure to surrender such property.

Specifically, on November 15, 1954, taxes in the amount of \$804.50 were assessed against the taxpayer; the taxpayer was notified of this assessment and demand was made upon him to pay it, but he neglected or refused to do so. (R. 10, 40-41.) Later, on March 1, 1955, additional taxes in the amount of \$187.51 were assessed against the taxpayer, notice was served, and demand was made upon him; the taxpayer also neglected or refused to pay these taxes. (R. 11, 41.) More than ten days having passed from the time of these notices and demands, the District Director was authorized to levy upon all property or rights to property belonging to the taxpayer or on which there was a federal tax lien with respect to the taxes which were the subject of the notices and demands. Sec. 6321(a) of the Internal Revenue Code of 1954. On June 10, 1955, the taxpayer had on deposit in a checking account with the Bank the sum of not less than \$78.16. (R. 11, 41.) This checking account, under the authorities cited above, was clearly "property" or "rights to property" of the taxpayer; it was also property on which there was a federal tax lien, such liens arising on November 15, 1954 (in the amount of \$804.50), and on March 1, 1955 (in the amount of \$187.51), the dates of the assessments. Secs. 6321 and 6322 of the Internal Revenue Code of 1954. On June 10, 1955, the District Director properly levied

upon this account and demanded the surrender thereof by the Bank. (R. 11-12, 41-42.) The Bank was required by statute to surrender this account. Sec. 6332(a) of the Internal Revenue Code of 1954. The Bank refused to surrender the account (R. 12, 42) and, on June 14, 1955, the District Director made final demand on the Bank (R. 12-13, 43), which still refuses to surrender it. The Bank has thus become liable in its own person and estate to the United States in the sum equal to the amount of the account (\$878.16), which amount does not exceed the amount of the taxes for which the levy was made. (\$992.01). The Bank is also liable for costs and six per cent per annum interest on the amount of the levy from the date thereof, June 10, 1955. Sec. 6332(b) of the Internal Revenue Code of 1954. *United States v. Washington Trust Co. of Pittsburgh, Pa.* (W.D. Pa., decided April 13, 1956 (56-2 U.S.T.C., par. 9603); *United States v. Peoples State Bank* (S.D. Ind., decided August 17, 1955 (55-2 U.S.T.C., par. 9655).

The terms of Section 6332(a) of the 1954 Code permit the Bank only two defenses: (1) that it was not in possession of property of the taxpayer which was subject to levy, or (2) that the property was subject to a prior judicial attachment or execution. The statute admits of no other defenses. *United States v. Manufacturers Trust Co.*, *supra*; *Commonwealth Bank v. United States*, 115 2d 327 (C.A. 6th); *United States v. Third Nat. Bank & Trust Co.*, 111 F. Sup. 152 (M.D. Pa.). Here, there is no question of a judicial attachment or execution by the Bank or anyone

se. The Bank does contend, however (Br. 8, 11), that it was not in possession of property of the taxpayer which was subject to levy at the time of demand and levy. This contention is based on the assertion (Br. 8, 11) that the Bank had a contractual right of set-off by virtue of the agreement set forth in the financial statement submitted to the Bank by the taxpayer on August 31, 1954, and an equitable right of set-off by virtue of the promissory note executed by taxpayer on April 16, 1955. The Bank then submits (Br. 12-13) that these rights of set-off were paramount to the Government's tax lien. Since the allegedly paramount set-off was greater than the deposit, there was, the Bank argues, no property of the taxpayer in its possession. This contention and the underlying assertions upon which it is based are not supported by the facts of this case or the law with respect thereto. The Bank could not immunize the account from the federal tax levy by an inchoate agreement with its depositor nor by an asserted equitable right of set-off arising from a debt which was not in existence at the time the tax liens arose. *United States v. Manufacturers Trust Co.*, *supra*, p. 9; *United States v. Graham*, 96 F. Supp. 318 (S.D. Cal.), affirmed *per curiam sub nom. State of California v. United States*, 195 F. 2d 530 (C.A. 9th); cf. *United States v. Security Tr. & Sav. Bk.*, 340 U.S. 7, 50-51; *United States v. Kings County Iron Works*, 4 F. 2d 232, 236 (C.A. 2d).

With respect to the asserted right of set-off resulting from the agreement set forth in the financial state-

ment of August 31, 1954, the Bank is attempting to defeat the federal tax levy by means of a contractual right which was clearly inchoate at all material time. The agreement amounted to nothing more than a potential right to set-off in the event (1) the taxpayer became indebted to the Bank, (2) one of several contingencies occurred, and (3) the Bank exercised its option to set-off. (R. 15.) The record does not show that taxpayer was even indebted to the Bank at or about the time the agreement was executed. The debt which the Bank is attempting to set off did not even arise until April 16, 1955 (R. 22), almost a year after the agreement was executed and after the tax liens arose (the taxes being assessed on November 15, 1954, and March 1, 1955 (R. 10, 11, 40-41)). As to the contingencies which were set forth in the agreement before the Bank could exercise its option to set-off, these were, specifically, if taxpayer became insolvent, failed in business, or committed an act of bankruptcy; or if the deposit account or any other property of taxpayer held by the Bank was the subject of an attempt to be obtained by execution, garnishment, attachment or other legal process; or if any of the representations made by taxpayer proved to be untrue; or if taxpayer failed to notify the Bank of any material change in financial condition. (R. 15.) Here, there is no question of insolvency, business failure, acts of bankruptcy or misrepresentation by taxpayer. Similarly, there is no proof that taxpayer's financial condition materially changed—the mere fact that taxpayer refused to pay the tax and the Govern-

ment levied on his bank account does not mean that he did not have other assets to pay the tax or the debt or that his financial condition changed. The only fact which gave the Bank the option to set-off was the government's demand and levy—which occurred *prior* to the asserted exercise of the option.

Finally, it does not even clearly appear that the bank actually exercised its option to set-off. Although the Bank stated in a letter to the collection officer (R. 12, 42) that it was exercising its option to set-off, the bank records show that it did not in fact set off the amount in taxpayer's bank account against the debt owed the Bank, but instead, honored taxpayers' withdrawals on the date of the set-off and charged taxpayer's account with the amount of the Government levy, not the amount of the remaining balance of the account (\$209.71, plus a \$20 deposit which was accepted) or the amount of the debt owing to the bank (\$1,500). Indeed, the Bank continued to honor withdrawals and accept deposits thereafter and it does not appear that it ever set off the full amount of the debt. (R. 26-27.) The Bank is endeavoring to relate the asserted exercise of its contractual option to set-off back to the date of the original, inchoate financial statement which taxpayer submitted to the Bank on August 31, 1954.² As the foregoing facts clearly show, the debt arose after the tax liens attached and the alleged exercise of the option occurred not only after

²Taxpayer executed similar financial statements on February 28, 1955 (R. 15-16), and on May 31, 1955 (R. 20-21), but does not contend that these agreements are involved.

the liens attached, but after the demand was made upon the Bank. The doctrine of relation-back cannot operate to destroy the realities of this situation and cannot preclude the Government from pursuing its right to levy on the bank account of the delinquent taxpayer. See *United States v. Security Tr. & Sav. Bk.*, *supra*, p. 50.

It is equally clear that the assertion (Br. 8, 11) that the promissory note executed on April 16, 1955, gave rise to an equitable right of set-off which defeated the Government's levy is without merit. Taxpayer's contention in this respect is predicated on the assertion (Br. 8-10) that the note was a demand note and was therefore due on the date of its execution and delivery. Assuming, *arguendo*, that this is true, it only means that if an equitable right of set-off existed in favor of the Bank as a result of the note, it arose no earlier than April 16, 1955 (the date the note was executed), which was *after* the tax liens in question attached. Such right necessarily was born with the federal tax liens impressed thereon. *United States v. Graham*, *supra*. Moreover, the District Court found (R. 36, 40) that it was *not* the intention of the parties that the note was to be due immediately upon delivery, but that the note in question had not matured and was not intended to be payable prior to August 14, 1955, in absence of a demand. The court properly recognized that the rule that a note payable on demand is deemed to be due immediately does not apply where there is something on the paper or in the circumstances to show the contrary. *Sullivan v.*

Ills, 219 Fed. 694, 696 (C.A. 8th). Here, the face of the note,³ together with the fact that even when the set-off was asserted on June 10, 1955, the Bank did not set off the entire amount due on the note (\$1,500), supports the District Court's finding that the note was not intended to be due until August 1, 1955, unless demand was made sooner. Under this alternative view of the facts, the note was not due until after the tax liens attached and the demand and levy were made upon the Bank and any equitable right of set-off based upon the note, if such right existed at all, did not arise until then. Under either view of the facts, the Bank's asserted equitable right of set-off (based upon the note) cannot defeat the levy. Furthermore, the mere fact that the note might be due, regardless of the date, does not mean that an equitable right of set-off exists. Such right would not exist in the absence of facts which show that the maker cannot pay (as where the maker becomes insolvent), or will not do so (as where the maker refuses to pay upon demand after maturity), or where the creditor has no practical legal remedy. *American Surety Co. v. City of Akron*, 95 F. 2d 966 (C.A. 6th); see, *J. L. Hudson Co. v. Thomas*, 6 F. Supp. 857 (E.D. Mich.).

It might also be noted that the Bank's attempt to assert a right of set-off is tantamount to an assertion

³The note read, in part, as follows (R. 35):

On Demand; if no demand is made then on August 14th, 1955, for value received, I promise to pay in lawful money of the United States of America, to the order of the Bank of Nevada * * * Two Thousand and no/100 Dollars.

by the Bank of a prior lien. Indeed, in its brief in the District Court, the Bank expressly contended (L. 36) that the right of set-off created a lien on the bank deposits which was prior to the federal tax liens and, in this Court, the Bank likewise contends (Br. 12-1) that its right of set-off is paramount to the tax liens. Technically, the instant suit is one to enforce the liability for failure to surrender property which is subject to a levy, as provided by Section 6332(b) of the 1954 Code and is not a suit to directly assert a prior lien. Cf. *Commonwealth Bank v. United States*, *supra*; *United States v. Third Nat. Bank & Trust Co.*, *supra*. The question of the priority of the tax liens which are involved here arises indirectly from the Bank's efforts to show that it did not hold property subject to levy, but that an allegedly prior right of set-off existed which extinguished the taxpayer's property rights prior to the attachment of the tax liens or the date of the levy. However, even if the question is viewed solely as one involving the priority of liens, it is clear that the tax liens in question were paramount to any rights of the Bank and it follows, *a fortiori*, that the Government's levy was valid and that the Bank was required to surrender the property or be liable for its failure to do so.

As fully discussed in connection with the question of whether the Bank held property subject to levy, the priority of liens depends upon the time the lien attaches and becomes choate, and the priority of a federal tax lien is not defeated by a contingent, inchoate lien. A lien is inchoate, in the federal sense,

Whenever numerous contingencies might arise before the lien ripens and is only perfected when there is nothing more to be done to have a choate lien. *United States v. New Britain*, 347 U.S. 81; *United States v. Scribner*, 348 U.S. 211; *United States v. Liverpool & London Ins. Co.*, *supra*; *United States v. Security Tr. & Sav. Bk.*, *supra*. As discussed above, the agreement and the financial statement of August 14, 1954, and any contingencies which might arise therefrom, were clearly inchoate at the time of the agreement's execution and at the time the tax liens arose (November 15, 1954, and March 1, 1955), and at the time of the levy and demand (June 10, 1955). There was no certainty on August 14, 1955, that a loan would be made by the Bank and, after a loan was made on April 16, 1955, there was no certainty that any of the contingencies set forth in the agreement would arise or that the Bank would exercise its option to set-off even if one of the contingencies did occur. Indeed, it was only after the very levy and demand in question which provided for the occurrence which occasioned the Bank to exercise its option to set-off, and, clearly, it was not until after this levy that the Bank expressed its desire to exercise its option. Even then, as noted above, it is not clear that the Bank actually did set off the debt.

Insofar as any lien arising from the note is concerned, it is apparent that the note, being executed after the tax liens arose, was subordinate thereto. The Bank, as the creditor on a note, was clearly not a mortgagee, pledgee, purchaser or judgment creditor which would be entitled to priority under Section

6323 of the Internal Revenue Code of 1954 (Appendix, *infra*). See *United States v. Security Tr. & So. Bk.*, *supra*, pp. 51-53.⁴

Thus, whether the question be viewed as one involving the question of whether the Bank held property of a delinquent taxpayer which was subject to levy (and thus was under an obligation to surrender such property upon levy and demand or be subject to a statutory penalty), or as a question involving the priority of liens, the District Court was correct in concluding (R.43) that the Government's liens were paramount and valid and that the Government was entitled to judgment.

Taxpayer relies upon *United States v. Winnett*, 165 F. 2d 149 (C.A. 9th) (Br. 7, 12), but, as was noted by the District Court in *United States v. Graham*, *supra*, the facts in the *Winnett* case are clearly distinguishable from those in the case at bar. In the *Winnett* case, the underlying debt owing from the delinquent taxpayer to Winnett was in existence, and the taxpayer was found to be insolvent prior to the attachment of the tax liens. This Court held, in the *Winnett* case (p. 151), that the right of set-off accrued because of (and on the date of) the taxpayer's insolvency. Here, as discussed above, the underlying debt owing from the delinquent taxpayer to

⁴In addition to the Bank not being one of the four classes of parties against whom the tax lien is invalid unless first recorded, the first lien in question (which arose on November 15, 1954) was recorded on January 12, 1955, before the note in question was executed. (R. 10, 41.)

the Bank (the note) did not exist until after the tax liens arose; there was and is no insolvency involved; and there are no other facts giving rise to a right of set-off until after the liens attached. Taxpayer also cites the *Winnett* case (Br. 11) as holding that the collector can reach nothing that the taxpayer could not have reached. Assuming, *arguendo*, that this proposition is correct, we would like to point out that the taxpayer, *at the time of the levy and demand*, had full right to use his bank account and, indeed, on the day of the levy, taxpayer withdrew and deposited various amounts and has continued to do so. (p. 26-27.) The Bank did not, in fact, attempt to set off any portion of the debt until after the demands were made upon it. (R. 12, 31, 42.) In connection with the statement in the *Winnett* case (p. 151) that the equitable right of set-off relates back to the date of the agreement, not only did the Court later refuse to apply the doctrine of relation-back in a case in which the right of set-off accrued subsequent to the attachment of the liens (*United States v. Graham, supra*) but it should be noted that the *Winnett* case was decided prior to *United States v. Security Tr. & Sav. Bk., supra*, in which the Supreme Court (340 U.S., p. 50) held that the doctrine of relation-back could not be applied to defeat a federal tax lien. Finally, it is now clear that the inequity which disturbed this Court in the *Winnett* case, i.e., the possibility that Winnett would be required to pay the debt being levied upon twice (i.e., to the Government and to his creditor) does not exist. In the event the person levied upon is

required to turn over the property involved or to pay the penalty upon refusal to do so, that person would be released from further liability to the extent of his payments. *United States v. Eiland, supra*; *United States v. Manufacturers Trust Co., supra*; *United States v. Peoples State Bank, supra*. Indeed, it is not only the *Graham* case that assists in distinguishing the *Winnett* case, but it lends direct support to the Government's position. In the *Graham* case, the United States sought to enforce tax liens against amounts earned by the taxpayer under leases with the State of California. The federal liens preceded the accrual of any amounts to the taxpayer under the leases. The State refused to honor the federal liens, asserting that it was entitled to set off the taxpayer's unpaid state taxes against the amounts later accrued on the leases. In an action to foreclose on the liens, the District Court held that the State's right of set-off, if such existed, was secondary to the federal tax lien, stating (96 F. Supp., p. 321):

The 1942 income tax assessment against the taxpayer, Warren C. Graham, was received by the Collector on March 23, 1945, more than a year and three months before the leases with the State of California were entered into. The tax due under this assessment is still due. Any money that accrued to the taxpayer under the lease with the state accrued with a lien impressed upon it. There was no period of time in which the State of California's right of set-off could have been asserted against the debt to the taxpayer that the property was not impressed with the tax lien. In

U.S. v. Winnett, supra, the right of set-off accrued before any tax liens arose.

* * * * *

Assuming arguendo that the State of California may assert an equitable set-off against a delinquent taxpayer, the set-off could have been asserted no earlier than the time at which the lease agreements were entered into with the taxpayer. No set-off could arise until such time as there existed something to be set-off against. But the rights of the taxpayer under the lease were born with the tax lien impressed thereon.

Assuming further that the set-off and the tax liens attached simultaneously to the interest of the taxpayer created by the lease agreements, no citation of authority is needed to establish that the federal tax lien is superior to any simultaneously attaching interest of the State of California. Therefore, the rights of the defendant, State of California, with respect to the money accrued as rentals under the leases made with the taxpayer are inferior to the tax liens of the United States.

Taxpayer also relies upon *Updike v. Manufacturers Trust Co.*, 243 App. Div. 15, 275 N.Y.S. 716. (Br. 7, 13.) This case deals with the right of a bank, under New York law, to set off a depositor's unmatured note against a deposit, upon notice of a material change in the depositor's financial condition and does not deal with the priority of tax liens or the extent of the Government's right to levy against a creditor of a delinquent taxpayer who also holds property

of the taxpayer. The latter issue, which is the one involved here, is a federal question and is to be determined by federal law. State law, particularly that of New York (when the case involves a Nevada bank, taxpayer and transaction), should not control. *United States v. Scovil*, 348 U.S. 218, 220; *United States v. Aciri*, 348 U.S. 211, 213; *United States v. Security Tr. & Sav. Bk.*, *supra*, p. 49.

In conclusion, the Bank's closing argument (p. 13) that the decision of the District Court infringes upon the rights of a bank and its depositor to enter into usual banking transactions and will impair the making of bank loans is not material to the issues in this case. The priority of the tax liens as set by statute and judicial decisions, the broad statutory remedy of levy as a device to enforce the collection of taxes (see *United States v. Eiland*, *supra*, pp. 121-122; *United States v. Manufacturers Trust Co.*, *supra* p. 368), and the personal liability of the Bank for failure to surrender property levied upon are clear. There is nothing in the statute or the decisions to indicate that banks are to be placed in any special position or are to be accorded any preferred treatment as compared with other types of creditors.

CONCLUSION.

The decision of the District Court is correct and
ould be affirmed.

Respectfully submitted,

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(Appendix Follows.)



Appendix.

Appendix

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, additional tax, or assessable penalty, together with any costs (it may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(U.S.C. 1952 ed., Supp. II, Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time of assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(U.S.C. 1952 ed., Supp. II, Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against a mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien

is situated, whenever the State or Territory as by law designated an office within the State or Territory for the filing of such notice; or

* * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6323.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

* * *

(b) *Seizure and Sale of Property.*—The term “levy” as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to

property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is at the time of such demand, subject to an attachment or execution under any judicial process.

b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

* * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6332.)

The provisions of Sections 3670, 3671, 3672, 3690 and 3710 of the Internal Revenue Code of 1939 are substantially the same as the provisions of the 1954 Code which are set forth above. The above provisions of the 1954 Code are applicable after January 1, 1955, to all internal revenue taxes whether imposed by the 1939 or 1954 Codes. Section 7851(a)(6)(B) of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Sec. 7851.)

No. 15,541

IN THE

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BANK OF NEVADA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court
for the District of Nevada.**

APPELLANT'S REPLY BRIEF.

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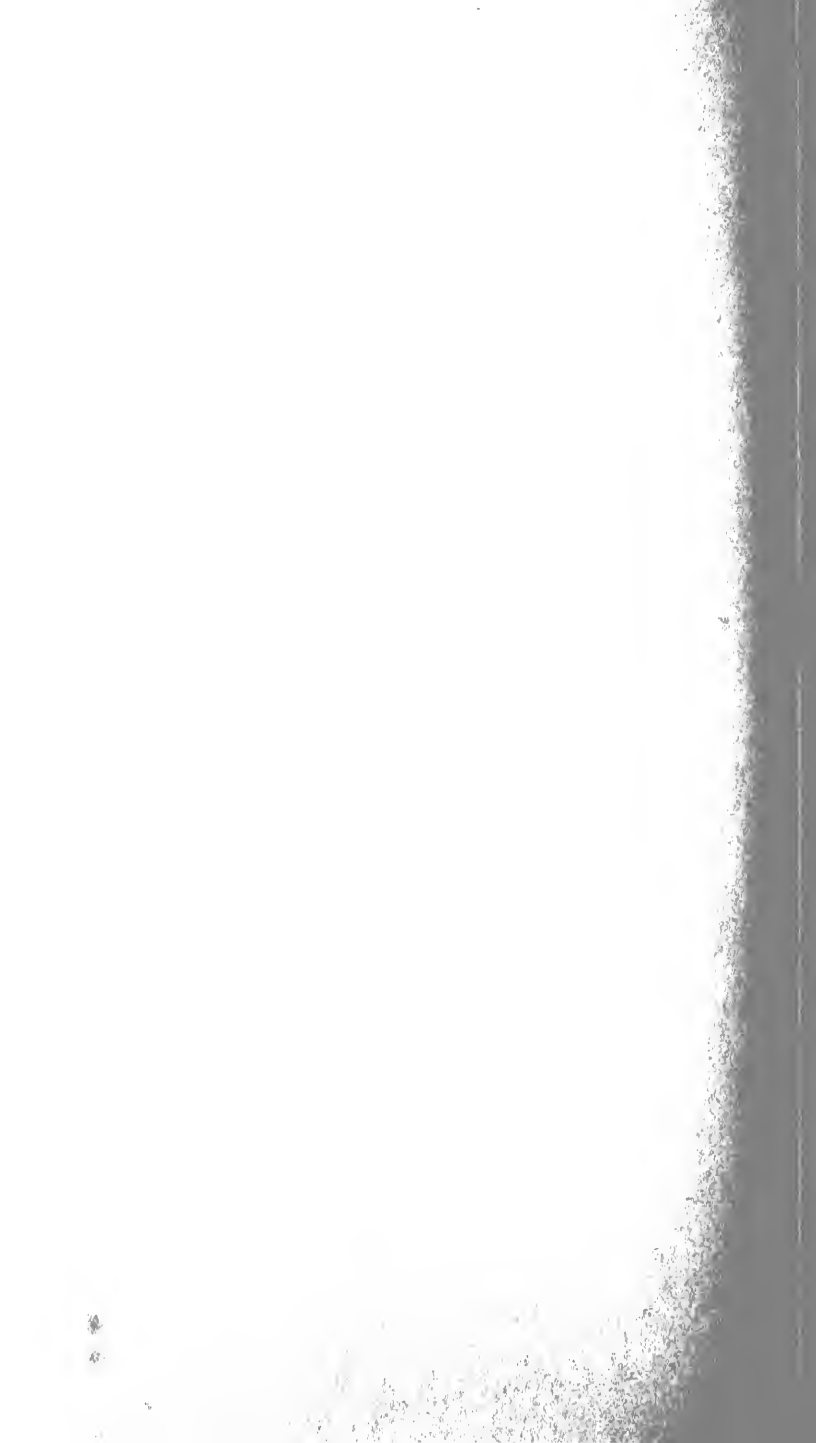
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Appellee.

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for the District of Nevada.**

APPELLANT'S REPLY BRIEF.

JURISDICTION.

The statements of jurisdiction contained in Appellant's and Appellee's briefs adequately set forth the jurisdiction of this Court to entertain this appeal.

STATEMENT OF CASE.

The facts of the case are fully set forth in the Brief of Appellant at pages two (2) to five (5) thereof, and in the Brief of Appellee at pages three (3) to seven (7) thereof.

However, it is noted that the bank statements of the taxpayer, J. D. Bentley's checking account (G. 22-27), indicate that on April 16, 1955, the same day as the execution of the demand promissory note in question, the sum of \$2,000.00 was deposited to the taxpayer's account, which was the identical sum that borrowed and evidenced by said note.

SUMMARY OF ARGUMENT.

The position of the Appellant is, and consistently has been, that it was not in the possession of any property belonging to the taxpayer-depositor which was subject to the tax levy upon it by the collector. This contention is based upon the demand promissory note dated April 16, 1955, executed by the taxpayer-depositor to the appellant bank, (R. 19) and upon a special contract entered into by and between the appellant and the taxpayer-depositor which was dated August 31, 1954 (R. 17-18) and subsequently renewed (R. 20-21), giving the appellant the right to set off the taxpayer-depositor's account against any indebtedness owing to the bank.

The appellee in its reply brief takes the position that this right of set off possessed by the appellant was an inchoate and merely potential right to apply the funds of the taxpayer-depositor to any indebtedness owing to the appellant (B. 8). It is further contended by the appellee that it isn't even clear that

the appellant bank exercised its right of set off, (B. 9) at the time of the levy and that the appellant could not validly exercise this right in the absence of a showing that the taxpayer-depositor cannot, or will not, pay or that the appellant had no other practical legal remedy to recover this indebtedness (B. 10).

The contentions of the appellee, based upon the facts in this case, in the opinion of the appellant, are clearly against the evidence and the law as will be disclosed by the argument to follow:

ARGUMENT.

THERE IS NO PROPERTY OF THE TAXPAYER-DEPOSITOR IN THE POSSESSION OF THE APPELLANT SUBJECT TO A TAX LIEN.

It is submitted by the Appellant that the procedure of levy by the collector upon the deposit of the taxpayer with the appellant bank was proper, however, it is contended by the appellant bank that this attempted levy and procedure in essence should be treated in all respects as nothing more than a garnishment of the bank account by the collector. *United States v. Bank of United States*, 5 F. Supp. 942. In this respect it is clear and established law that the rights of the garnisher do not rise above or beyond those of his depositor, as stated by Mr. Justice Jackson in the case of *No. Chicago Rolling Mill Co. v. Oregon & Steel Co.*, 152 U.S. 596, 14 Sup. Ct. 710.

The rights of the bank to a set off may depend upon the law of the particular state or upon any particular

specific arrangements which it may have made with its depositor. As has been set out by the case of *United States v. Bank of United States*, 5 F. Supp. 942, wherein the facts are similar in all respects to the instant case, and the court followed the above principle and held that the rights of the collector could not rise above those of the depositor upon which he attempted to levy. It is contended by the appellant that in the instant case these specific arrangements with the depositor were covered by the agreement entered into on the 31st day of August, 1954 (R. 1-18) and renewed subsequently thereto (R. 20-21). This right of set off possessed by the appellant was a perfected right and existed at all times material hereto. It is clear from this agreement that it was intended by the appellant and the taxpayer-depositor that the bank should have this perfected right at the time of the execution of the agreement and in this respect it was intended that the account of the taxpayer should at all times be security for any indebtedness which the taxpayer might have owed to the appellant bank.

It is clear from the case of *United States v. Winnett*, 165 F. 2d 149, that such a right of set off by agreement is a perfected right which becomes so upon the date of the execution of the agreement, and that the mere exercise of the rights upon this agreement sometime subsequent to the time of execution in no way affects the validity of the agreement entered into.

It is therefore the contention of the appellant that the only method by which it can be determined

whether the appellant was in possession of the property of the taxpayer-depositor subject to a levy, as in the case of a bank deposit, is by deducting the debits from the credits, and the sum left in favor of the depositor was the balance or property subject to the tax lien. This is true whether the debits are outstanding checks or created by agreements. Certainly the depositor could not reach or obtain any sums from his bank account, in the instant case, without the approval of the appellant, and the levy of the appellee could likewise attach to only the credits to which the taxpayer-depositor had an unqualified right.

**THE APPELLANT EXERCISED ITS RIGHT OF SET OFF
AT THE TIME OF THE LEVY.**

It has been stated by the appellee in its brief that it is not clear that the appellant bank actually exercised any set off, (B. 9). Such a conclusion is clearly against the evidence, as it appears from the evidence that the bank on June 10, 1955, at the time of the levy by the collector, exercised its right of set off to the balance remaining in the taxpayer-depositor's account (R. 26). In fact, the evidence shows that the appellant bank had exercised its option of set off against the taxpayer-depositor's account in the sum of \$878.16, at that time the taxpayer-depositor had an overdraft of \$648.45, and subsequent deposits in the sum of \$668.45 had been made to this account (R. 26)

which created a balance of \$20.00 to the credit of the taxpayer-depositor.

The fact that the appellant did not exercise its option of set off to the total sum of \$1500.00, which was the balance then due on the demand note executed on April 16, 1955, at the time of the levy is, of course, immaterial in view of the fact that by so doing the appellant would have waived any possibility of recovering at a later date the difference between the sum of \$878.16, which was applied as set off and the actual balance then due upon the balance of the note in the amount of \$1500.00.

THE RIGHT OF SET OFF BY THE APPELLANT IS NOT BASED UPON THE FACT THAT THE DEPOSITOR CANNOT OR WILL NOT PAY THE OBLIGATION OWED TO THE CREDITOR.

The true basis of the right of set off possessed by the appellant is not insolvency of the taxpayer-depositor or the lack of another remedy by the appellant to collect indebtedness owing from the taxpayer-depositor to the appellant, but rather rests upon the principle that as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such indebtedness, and it has, therefore, a right to retain such funds until payment is actually made.

Another reason given for this lien, or set off, is the fact that the bank gives credit to the depositor by allowing overdraft, or permitting notes or bills to become overdue on the faith of the bank deposit then

its hands, which it can then apply to the payment of its debt then past due. *Michie on Banks and Banking*, Volume 5A, Chapter 9, Section 114. It is not necessary for any formal proceeding on the part of the bank to entitle the bank to the benefit of a set off against a customer's deposit therein in the payment of his indebtedness to the bank.

It appears from the record that the deposit of \$1000.00 upon which the collector attempted to levy was created by and out of the same transaction with the loan evidenced by the note, and the funds from the promissory note executed to the appellant bank were deposited in the taxpayer-depositor's account at the time of the execution of the note (R. 22). In this respect the debts were joined together in origin, the debit being produced by the credit. It is clear that where debts in origin and in equity are joined together and arise out of the same transaction, the bank has the right in equity to set off the note which produced the credit, regardless of special agreement. *United States v. Bank of Shelby*, 68 Fed. 2d 538.

It is, therefore, the contention of the appellant that the appellant properly and validly exercised its right to set off the credit which produced the debt against the taxpayer-depositor's account.

CONCLUSION.

For the reasons stated herein, appellant respectfully submits a decree should issue, setting aside and reversing the opinion and judgment of the lower court entered therein.

Dated, September 25, 1957.

MILTON W. KEEFER,
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Bank of Nevada.*

No. 15,541

IN THE

United States Court of Appeals
For the Ninth Circuit

BANK OF NEVADA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

BANK OF NEVADA,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

to the Honorable Albert Lee Stephens, Chief Judge,
and to the Honorable Dal M. Lemmon and Frederick G. Hamley, Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The Bank of Nevada, the Appellant above named, presents this its petition for rehearing in the above titled cause, and, in support thereof, respectfully SAYS:

I.

THE COURT ERRED IN ITS APPLICATION OF THE LAW RE-
CITED IN THE CASE OF U.S. v. GRAHAM IN ITS OPINION
AFFIRMING THE JUDGMENT OF THE DISTRICT COURT.

This Honorable Court regarded the case of *U. S. v. Graham* (D.C. Cal. 1951) 96 F.Supp. 318, as controlling in section 5 of its opinion and concluded that a set-off could exist in the present case.

It is the opinion of the Petitioner herein that the *Graham* case is clearly distinguishable on its facts from the case at bar in the following respects:

It is agreed that in both cases the obligation of the third party to the taxpayer arose after the federal tax liens had been established. That is, in the *Graham* case, the rental accrued from the State of California after the tax liens had been established, and in the *Bank of Nevada* case, if the "first-in, first-out" theory is applied, the deposits sought to be subjected to the federal tax liens were made after those liens had been established. It is also true that the obligation from the taxpayer to the third party, which the third party sought to set-off, in each case arose after the establishment of the federal tax liens. That is, in the *Graham* case the state taxes apparently became due after the federal tax liens had become effective, and in the *Bank of Nevada* case the loan was made to the taxpayer after the federal tax liens had come into being.

However, here the similarity between the cases ceases, and in the *Graham* case the claim for state taxes was totally unrelated to the rentals due under the leases. In the *Bank of Nevada* case, the debt of the bank due the taxpayer, represented by the deposit balance, can be said to have arisen from the loan by the bank. The deposit of the taxpayer to the extent of \$2,000, was from its inception subject to the bank's right of set-off, a right arising from the very transaction which created the deposit and inseparable from the bank's debt to the taxpayer.

In the *Graham* case, the state's claim for taxes was in no way identified with or attached to the state's

ental obligation. It was an entirely separate transaction.

But in the *Bank of Nevada* case the claim the bank sought to set-off against the debt to the taxpayer came into being simultaneously with the debt to the taxpayer, and the right of set-off was in fact provided for by agreement between the bank and the taxpayer before the federal tax liens were established.

Such an agreement as was contained in the financial statement of August 14, 1954, between the Bank of Nevada and the taxpayer, is an integral part of such normal daily banking transactions as are described in the case at bar. This is, and has been, for an indeterminable period of time in the past, part of the normal daily procedure in banking transactions of this nature, wherein daily, banks throughout the United States make unsecured loans to their existing commercial depositors to tide them over the temporary financial crises of present day business. All such unsecured loans are predicated upon an agreement with the depositor that any funds on deposit with the bank shall be security for such loans.

The present opinion seems to treat the rights of the bank as a lien which arose after the two tax liens and was, therefore, subordinate to the tax liens. If the rights of the bank were a lien, the only possible lien was a pledge of money in Bentley's account, and Section 6323(c) of the Internal Revenue Act of 1954 provides appellant with a complete statutory defense. This section reads:

“(c) Exception in case of securities.—

(1) Exception.—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser was without notice or knowledge of the existence of such lien.

(2) Definition of security.—As used in this subsection, the term 'security' means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money."

It is to be noted that the definition of "security" includes "money", and that tax liens, even recorded tax liens, "are not valid" with respect to a security as against a bona fide pledgee who at the time of the pledge was without notice or knowledge of the existence of the tax liens. No one can deny that the bank made the loan for full and adequate consideration, without notice or knowledge of either tax lien. The money in Bentley's account was a security held by the bank for Bentley's debt to the bank. Therefore,

the tax liens were not "valid" (to use the language of Section 6323(c)) against this security.

II.

THE COURT ERRED IN FINDING IN ITS OPINION THE ACTUAL SET-OFF OCCURRED SUBSEQUENT TO THE GOVERNMENT'S DEMAND AND LEVY, AND IN ITS APPLICATION OF THE CASE OF *U.S. v. WINNETT* IN SUPPORT THEREOF.

It is clear in the case of *U. S. v. Winnett*, 165 F. 2d 9, that a right of set-off can be created by an agreement and that such right is perfected at the time of the execution of the agreement continuing thereafter until the events occur, which are provided for in the agreement, to automatically give effect to the right of set-off. This is exactly what happened in the *Winnett* case, and under no interpretation of said case can it be said that the right of set-off was inchoate and required further acts upon the part of the person having said right to apply the unappropriated money of his debtor in his hands in extinguishment of the debts due to him.

The theory adopted by the Court, in its present opinion, would mean that all set-offs are inchoate and perfected only after process is received, or in the instant case, after notice of levy had been received by the bank. It is the Petitioner's opinion that such a conclusion is contrary to the law of the *Winnett* case, and, in fact, that case holds that the instantaneous decision to make the set-off should be the controlling factor. In fact any other conclusion is completely unrealistic.

The facts of any case where set-off is applied, will support the above conclusion, and that conclusion only, for when any official, sheriff or constable proceeds to serve a levy upon a debtor, that debtor cannot have knowledge of the name of the person involved until the official, sheriff or constable, notifies him of the same, or until his name is disclosed by the service of the levy or writ. Therefore, it is at that special moment, at the time of service of levy upon the bank, that Mr. Bentley no longer had the right to use the money or the credit with the bank, and at that instant the set-off took place, and the only thing remaining to be done was for the officer or employee receiving the levy to notify the bookkeeping department to make the actual entry upon the ledger sheet maintained for the taxpayer. This is what actually occurred in the present case, and what in reality occurs instantly not "after" in all cases of set-off.

Another factor ignored by the Court in its opinion is that actually the taxpayer in the instant case was using the bank's money, and not his own, for the bank had loaned the sum of \$2,000 to Mr. Bentley, which he deposited in the account. The bank permitted Mr. Bentley to use its money conditioned upon and in consideration for the right of set-off and the right to terminate the use of said funds. As a consequence the rights of Bentley ceased immediately upon the service of notice of levy, and the right of the bank to set-off any balance due against the loan arose immediately. One is the consideration for the other. It is inequitable to enforce one without enforce-

ing the other. To hold that such a right of set-off inchoate and can only occur after the notice of levy and demand by the Government would in effect create greater rights in the fund or the credit than the depositor had. This is the opinion of the Petitioner as the holding of the *Winnett* case and the cases cited in that decision.

It is concluded, therefore, that the present opinion of this Court fails to apply and ignores the well-established rule set forth in the *Winnett* case and supported by the case of *No. Chicago Rolling Mills Co. v. Oregon & Steel Co.*, 152 U.S. 596, 14 Sup. Ct. 710, that a creditor or garnishor can have no greater rights than those of a person against whom the garnishment or levy is sought to be enforced, or as in this case, the taxpayer or depositor whose right to the use of money or bank credit is sought to be levied upon.

It is the conclusion of the Petitioner that the right of set-off in the instant case was not inchoate in any respect and did not relate back to the date of the agreement, as understood upon the doctrine of "relation back" as determined by the case of *U. S. v. Security Trust and Savings Bank*, 1950, 340 U.S. 47, but rather that such agreement is a continuing one which created the condition upon which the bank will make unsecured loans and which relates to the basis upon which the borrower pledges any credits to which he may be entitled from the bank as security for such loan.

III.

**THE COURT ERRED IN FAILING TO CONSIDER THE
CASE OF U.S. v. BANK OF SHELBY.**

In the case of *U. S. v. Bank of Shelby*, 68 F. 2d 53 (C.A. 5th), cited on page 7 of Appellant's Reply Brief the Appellate Court upheld the right of set-off in a situation similar in all practical respects to the case at bar. In the *Shelby* case, the obligation of the third party to the taxpayer, and the obligation from the taxpayer to the third party, arose out of the same transaction wherein a promissory note was given and the funds obtained therefrom deposited to the taxpayer's account. The Court at page 539 recognized the rule in equity which permits set-off of unmatured debts when the debtor is insolvent but based its decision upon "another potent fact" that the two obligations, the bank account of the taxpayer and its debt to the bank, "arose out of the same transaction and the one is the consideration for the other". Petitioner believes that the *Bank of Shelby* case, which allowed the set-off even though the loan was made after the tax lien arose, should be the basis for allowing the set-off in the present case.

Wherefore, upon the foregoing grounds it is respectfully urged that this Petition for Rehearing be granted, that argument thereon be heard by this Honorable Court *en banc* because of the extreme and widespread importance to all commercial banking and all banks doing business in the United States, and further due to the fact that the ultimate opinion in this case will have an extreme effect upon the practice of all

anks with respect to any and all future unsecured
ans, and that the judgment of the District Court be,
on further consideration, reversed.

Dated, Las Vegas, Nevada,
January 22, 1958.

MILTON W. KEEFER,

B. MAHLON BROWN,

*Attorneys for Appellant and
Petitioner Bank of Nevada.*

CERTIFICATE OF COUNSEL.

We, Milton W. Keefer and B. Mahlon Brown, attorneys for Appellant, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for purpose of delay.

Dated, Las Vegas, Nevada,

January 22, 1958.

MILTON W. KEEFER,

B. MAHLON BROWN.

No. 15553

United States
Court of Appeals
for the Ninth Circuit

FARMERS' MUTUAL INSURANCE CO.,
Appellant,
vs.
JOHN L. ROE, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

AUG 21 1957

PAUL P. O'BRIEN, CLERK



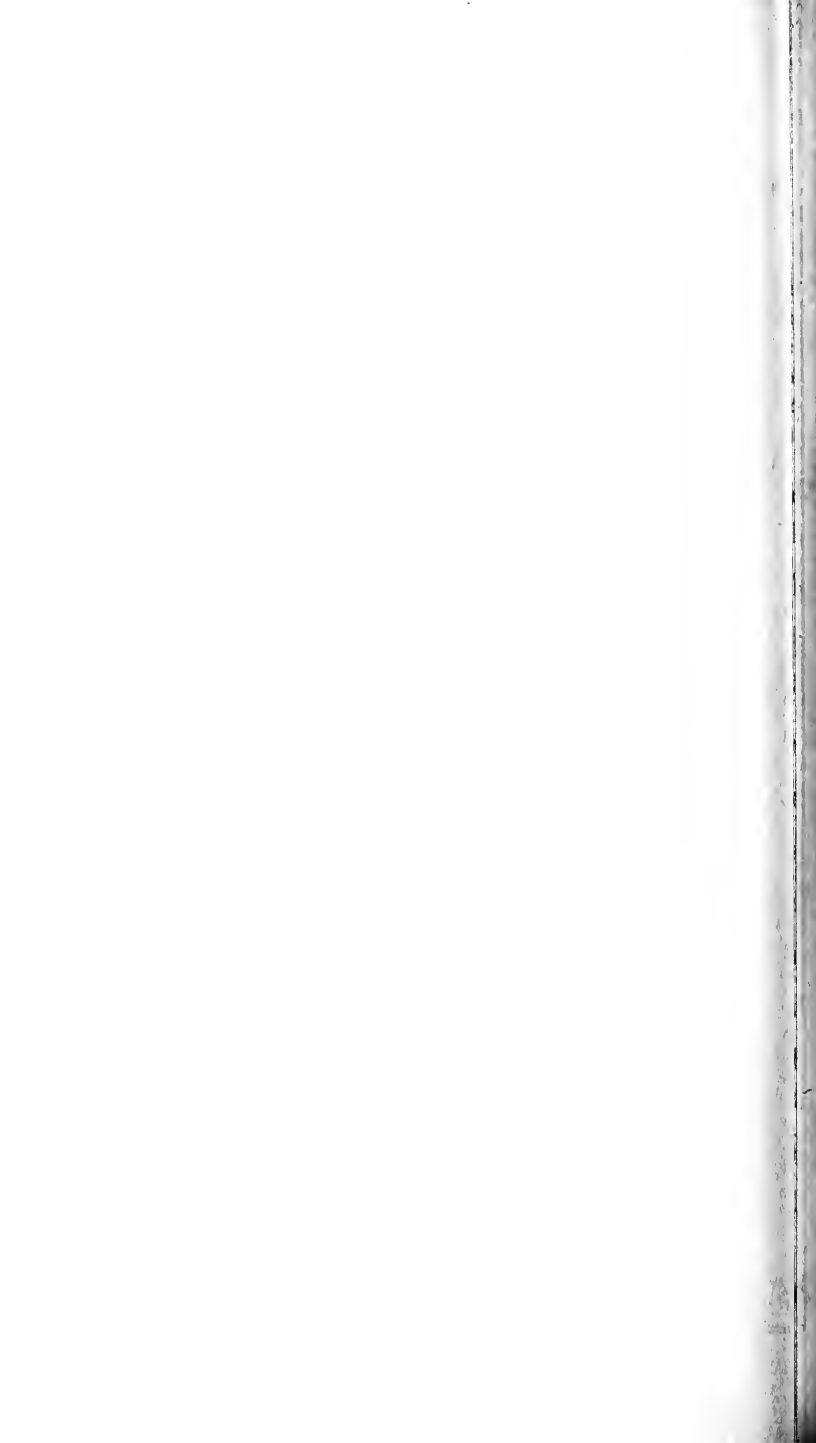
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United States
Court of Appeals
for the Ninth Circuit

FARMERS' MUTUAL INSURANCE CO.,
Appellant,
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JOHN L. ROE, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

VERGEER & SAMUELS,

DUANE VERGEER,

CHARLES CROOKHAM,

1027 East Burnside Street,
Portland 14, Oregon,
For Appellant.

McCORMICK & WELLS,

DONALD B. McCORMICK,

CARL ROBERT WELLS,

Equitable Building,
Portland, Oregon,
For Appellee.

In the District Court of the United States
for the District of Oregon

Civ. No. 8470

JOHN L. ROE,

Plaintiff,

vs.

FARMERS' MUTUAL INSURANCE CO.,

Defendant.

COMPLAINT

Comes now plaintiff and for cause of action
against defendant alleges:

I.

Plaintiff is a citizen of the State of Oregon and
defendant is a corporation incorporated under the
laws of the State of Washington. The matter in con-
troversy exceeds, exclusive of interest and costs, the
sum of \$3,000.00.

II.

On July 30, 1954, judgment was entered in the
Circuit Court of the State of Oregon for the County
of Multnomah in favor of plaintiff and against a
certain Kenneth Pedro in the sum of \$3,500.00, plus
his costs and disbursements taxed at \$43.05, upon a
cause of action for damages for personal injuries to
plaintiff arising out of the use and operation of an
automobile by said Kenneth Pedro, which judgment
remains unsatisfied and more than 30 days have
elapsed from the date of entry of said judgment.

III.

Defendant is in the business of writing automobile public liability insurance policies, and at all times material herein, defendant held such a policy in effect covering said Kenneth Pedro by which defendant agreed to indemnify him against such liability, not to exceed \$10,000.00.

IV.

Despite demand, defendant has failed, neglected and refused to pay said judgment, or any part thereof, and there is now due and owing thereon the sum of \$3,500.00, together with interest at the rate of 6% per annum from July 30, 1954, until paid, and the sum of \$43.05, together with interest at the rate of 6% per annum from July 30, 1954, until paid.

V.

More than six months have expired from date said judgment has remained unsatisfied, and plaintiff is entitled to recover his reasonable attorney's fee herein, in the sum of \$1,500.00.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$3,500.00, together with interest thereon at the rate of 6% per annum from July 30, 1954, until paid, and for the sum of \$43.05 together with interest thereon at the rate of 6% per annum from July 30, 1954, until paid, and for the further sum of \$1,500.00, his reasonable attorney's

fee, and for his costs and disbursements incurred herein.

McCORMICK & WELLS,
/s/ By DONALD B. McCORMICK,
Attorneys for Plaintiff.

Notice of Demand for Jury Trial

Plaintiff hereby demands jury trial of all issues triable to a jury.

/s/ DONALD B. McCORMICK.

[Endorsed]: Filed Feb. 14, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter came on for pre-trial conference on the 21st day of May, 1956, before the undersigned Judge of the above-entitled Court. Plaintiff appeared by Carl Robert Wells, of his attorneys, and defendant appeared by Duane Vergeer, of its attorneys. The parties, with the approval of the Court, agreed upon the following:

Statement of Facts

1. Plaintiff is a citizen of the State of Oregon and defendant is a corporation incorporated under the laws of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.
2. On July 30, 1954, judgment was entered in the

Circuit Court of the State of Oregon for the County of Multnomah in favor of plaintiff and against a certain Kenneth Pedro in the sum of \$3,500.00, plus his costs and disbursements taxes at \$43.05, upon a cause of action for damages for personal injuries to plaintiff arising out of the use and operation of an automobile by said Kenneth Pedro, which judgment remains unsatisfied and more than 30 days have elapsed from the date of entry of said judgment.

3. Defendant is in the business of writing automobile public liability insurance policies, and at all times material herein, defendant held such a policy in effect covering said Kenneth Pedro by which defendant agreed to indemnify him against such liability, not to exceed \$10,000.00.

4. Said policy contained a provision, as follows: "If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

5. Despite demand, defendant has failed, neglected and refused to pay said judgment, or any part thereof, and there is now due and owing thereon the sum of \$3,500.00, together with interest at the rate of 6% per annum from July 30, 1954, until paid, and the sum of \$43.05, together with interest at the rate of 6% per annum from July 30, 1954, until paid.

6. Personal service was had on Kenneth Pedro of the complaint and summons in plaintiff's action

against him, referred to in paragraph 2 hereinabove, in Multnomah County, Oregon, on or about May 20, 1954, by delivery to him by the Sheriff of said county and state of a copy of said summons and complaint.

7. Pre-Trial Exhibit A which is attached hereto is the policy of insurance the defendant had issued to Kenneth Pedro and no further identification of the same is necessary, and that the same may be received into evidence in this matter.

Plaintiff's Contentions of Fact

1. Defendant had actual notice and knowledge of the accident out of which plaintiff's claim against Kenneth Pedro arose, within a reasonable time after the occurrence of the accident.

2. Defendant had actual notice and knowledge of the existence of plaintiff's lawsuit against Kenneth Pedro within a reasonable time after said lawsuit was commenced and prior to the time of judgment.

3. Defendant was not substantially prejudiced by failure, if any, on the part of Kenneth Pedro to forward to it a copy of the complaint and summons in plaintiff's case against him.

4. Defendant was not substantially prejudiced by failure, if any, on the part of Kenneth Pedro to advise the defendant or keep it advised of his presence or address.

5. Defendant denies the above contentions.

Defendant's Contentions of Fact

1. That suit papers including the summons and complaint referred to in paragraph 6 of the agreed facts were never forwarded by Kenneth Pedro to the defendant.

2. That subsequent to the commencement of the action by the present plaintiff against Kenneth Pedro, the defendant was not advised by Kenneth Pedro of his address and Kenneth Pedro failed to keep the defendant advised of his presence or subsequent address.

3. That no action against this defendant lies until or unless every condition precedent to the bringing thereof is met.

4. That the insurance above referred to is and was in all material respects identical with the policy form marked Pre-Trial Exhibit A, a copy which is attached hereto and by reference made a part hereof as though the same was fully set forth herein at this particular point.

5. That the defendant never received notice of the pendency of the action brought by Roe against Pedro and was not given an opportunity to defend the same or to compromise or settle said claim.

Plaintiff denies the above contentions.

Plaintiff's Contentions of Law

1. The burden of proving that the insured failed to forward suit papers to the insurer in accordance with a policy provision requiring him to do so

which is alleged as an affirmative defense in defendant's answer herein, is upon the defendant.

2. Where the insurer has actual notice and an opportunity to make an investigation and defend the suit, a failure on the part of the insured to forward to the insurer copies of the suit papers will not prevent a recovery by a third party against the insurer on a judgment subsequently obtained against the insured.

3. A violation by the insured of a policy condition to forward suit papers is not a defense to the insurer against an action by a third party on a judgment obtained against the insured, unless the insurer has been substantially prejudiced by the failure on the part of the insured to forward the suit papers.

4. A violation by the insured of a policy condition to forward suit papers is not a defense to the insurer against an action by a third party on a judgment obtained against the insured.

5. The burden of proving that the insured failed to cooperate with the insurer is upon the defendant.

6. Failure of the insured to advise the insurer and keep it advised as to his presence or address is not a defense to the insurer against an action by a third party on a judgment obtained against the insured, unless the insurer has been substantially prejudiced by the failure on the part of the insured to advise the insurer.

7. Failure of the insured to advise the insurer and keep it advised as to his presence or address is not a defense to the insurer against an action by a third party on a judgment obtained against the insured.

Defendant's Contentions of Law

1. Failure to forward copies of process, including copies of Summons and Complaint was a failure to perform a condition precedent under the terms of the policy herein, and that as result thereof no coverage was applicable to the accident in question and/or the action and judgment resulting therefrom.

2. The burden of proof in the present case is upon the plaintiff to show that Kenneth Pedro performed all the conditions precedent to make coverage effective.

3. No prejudice need be shown when the failure to forward the suit papers, including complaint and summons, is established.

4. Failure to forward suit papers including summons and complaint relieves the insurer of any obligation to any judgment resulting against the assured.

5. Failure on the part of the assured to cooperate acts to relieve the insurer of all liability to pay any judgment resulting against the assured.

Issues of Fact

1. Whether Kenneth Pedro failed to forward

the defendant the demand, notice, summons or other process received by him or his representative in connection with plaintiff's action against him.

2. In addition to the alleged failure on the part of Kenneth Pedro to forward the process including summons and complaint to the defendant, was there any other failure to cooperate in his failure to keep the defendant advised of his present address.

Issues of Law

1. Who has the burden of proving the compliance or non-compliance of the insured with a policy condition requiring him immediately to forward to the insurer every demand, notice, summons or other process received to him or his representative if claim is made or suit is brought against him.

2. Is it necessary to the defense by the insurer against an action by a third party on a judgment obtained against the insurer which defense is based upon the alleged failure of the insured to forward suit papers, that the insurer be prejudiced by such failure of the insured to forward said papers.

3. Does the failure on the part of an insured under the terms of the policy herein, to forward copies of process, including summons and complaint, relieve the defendant insurer of the duty to defend and/or pay any judgment arising out of an action.

4. Was there a violation of cooperation by the defendant's insured herein and did the failure to

cooperate on the part of Kenneth Pedro absolve the defendant of any duty to defend and/or pay any judgments arising against the said Kenneth Pedro.

5. Who has the burden of proving its compliance or non-compliance by the insured of a policy condition requiring the insured to cooperate with the insurer.

6. Is it necessary to the defense by the insurer against an action by a third party on a judgment obtained against the insured which defense is based upon the alleged failure of the insured to advise the insurer and keep it advised of his presence or address, that the insured be prejudiced by the failure of the insured so to advise the insurer.

Stipulation

In the event that plaintiff becomes entitled to recover his reasonable attorney's fee herein, the Court may fix the amount thereof.

Jury Trial

Timely demand for a jury trial of all issues triable to a jury has been made by plaintiff.

The parties hereto having agreed to the foregoing pre-trial order and the Court being fully advised in the premises; now, therefore,

It Is Hereby Ordered that the foregoing Pre Trial Order be not amended except by consent of both parties or to prevent manifest injustice; and

It is Further Ordered that this Pre-Trial Order supersedes all pleadings herein; and

It Is Further Ordered that upon trial of the within cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted.

Dated at Portland, Oregon, this 18th day of January, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ CARL ROBERT WELLS,
Attorney for Plaintiff.

/s/ DUANE VERGEER,
Attorney for Defendant.

[Endorsed]: Filed Jan. 18, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly impaneled and sworn to try the above entitled cause find our verdict in favor of plaintiff and against defendant.

Dated at Portland, Oregon, this 21st day of January, 1957.

/s/ DELBERT O. SMITH,
Foreman.

[Endorsed]: Filed Jan. 21, 1957.

In the District Court of the United States
for the District of Oregon

Civ. No. 8470

JOHN L. ROE,

Plaintiff,

vs.

FARMERS' MUTUAL INSURANCE CO.,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial in the above-entitled Court and before jury on the 18th day of January, 1957; the plaintiff appearing in person and by Carl Robert Wells of his attorneys, and the defendant appearing in person and by Duane Vergeer of its attorneys; a jury having been duly empaneled and sworn to try the above-entitled cause; opening statements of

counsel having been made; witnesses having been sworn and testified and evidence having been adduced by both sides; both sides having rested and closing arguments having been made; and thereafter the Court having instructed the jury as to the law; and

Thereafter, and on the 21st day of January, 1957, the jury having returned its verdict, which in words and figures was and is substantially as follows, to wit:

"We, the Jury, duly impaneled and sworn to try the above entitled cause find our verdict in favor of plaintiff and against defendant.

"Dated at Portland, Oregon, this 21st day of January, 1957.

/s/ DELBERT O. SMITH,
Foreman."

It appearing that a trial of the above-entitled cause was duly and regularly had before a jury, and that the jury found their verdict in favor of plaintiff and against defendant, and that judgment should be entered herein in accordance with said verdict and in accordance with the Pre-Trial Order previously made and entered herein; now, therefore

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have judgment against defendant and recover of and from defendant the sum of \$3,543.05, together with interest thereon at the rate of 6% per annum from July 30, 1954, until paid and the further sum of \$500, plaintiff's reasonable attorney's fee herein as fixed by the Court, and for

plaintiff's costs and disbursements incurred herein, taxed at \$30.38, and that execution issue for all of the above.

Dated at Portland, Oregon, this 21st day of January, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Jan. 23, 1957.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT

This matter having come on upon motion of defendant for Judgment Notwithstanding the Verdict, and the Court having heard the arguments of counsel and counsel for each side having submitted to the Court an outline of their arguments and authorities, and the Court being fully advised in the premises and of the opinion that defendant's said motion should be denied; now, therefore,

It Is Hereby Adjudged that defendant's Motion for Judgment Notwithstanding Verdict be and the same hereby is denied.

Dated this 11th day of March, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Mar. 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To, the Clerk of the District Court of the United States for the District of Oregon; John L. Roe, the plaintiff herein; and Carl Robert Wells, his attorney, Greetings:

You and each of you will please take notice that the defendant in the above entitled matter does hereby give notice of appeal to The United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein in favor of the plaintiff and against the defendant.

Dated this 2nd day of April, 1957.

VERGEER & SAMUELS,
/s/ By DUANE VERGEER,
Of Attorneys for Defendant.

Affidavit of Service Attached.

[Endorsed]: Filed April 3, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH THE APPELLANT-DEFENDANT WILL RELY UPON APPEAL

Comes now the Appellant-Defendant, and presents the following as a Statement of Points upon which it intends to rely in its appeal of the above entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

That the complaint and the pre-trial order failed to state a cause of action against the defendant or any claim upon which relief could be predicated.

II.

The evidence showed affirmatively and as a matter of law that the policy coverage was voided as to any claim made by the plaintiff herein.

Dated this 10th day of April, 1957.

VERGEER & SAMUELS,
/s/ By C. S. CROOKHAM,
Of Attorneys for Defendant.

[Endorsed]: Filed April 10, 1957.

[Title of District Court and Cause.]

United States of America,
District of Oregon—ss:

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Pre-trial order; Verdict; Judgment; Order denying motion for judgment notwithstanding verdict; Notice of appeal; Statement of points upon which appellant-defendant will rely; Designation of contents of record on appeal; Order to transmit exhibits to court of appeals; Undertaking on appeal

supersedeas; Supplemental designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8470, in which Farmers' Mutual Insurance Co. is the defendant and appellant and John L. Roe is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith exhibits 1 to 5; 10 and 11.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 9th day of May, 1957.

[Seal]

R. DE MOTT,

Clerk,

/s/ By THORA LUND,

Deputy.

United States District Court
District of Oregon

No. Civil 8470

JOHN L. ROE,

Plaintiff,

vs.

FARMERS' MUTUAL INSURANCE CO,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, January 18, 1957

Before: Honorable Claude McColloch, Chief
Judge.

Appearances: Mr. Carl R. Wells, of Attorneys for
Plaintiff. Messrs. Duane Vergeer and Charles S.
Brookham, of Attorneys for Defendant.

The Court: Call a jury.

Mr. Vergeer: If the Court please, in connection
with this matter, I believe that the pre-trial order
has not yet been signed by the Court.

The Court: I will sign it.

Mr. Vergeer: There is a further matter, your
Honor. [1]* I believe that we would like to present
a motion for judgment based upon the pre-trial
order.

The Court: I will hear you later about that. Call
a jury.

* Page numbers appearing at top of page of original Reporter's
transcript of Record.

(Thereupon a jury was duly and regularly empaneled and sworn, counsel for the respective parties made opening statements to the jury and thereafter the following proceedings were had:)

Mr. Wells: The plaintiff calls Kenneth Pedro your Honor.

KENNETH PEDRO

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wells): Would you state your name for the jury, please, so they can hear it.

A. Kenneth Pedro.

Q. How old are you, Mr. Pedro?

A. 31. [2]

Q. What is your address?

A. 315 Northeast 141st.

Q. Is that in Portland, Oregon?

A. Yes, sir.

Q. What is your occupation?

A. I am a baker, work for Safeway.

Q. You work for Safeway?

A. Yes. I am a baker.

Q. Are you married? A. Yes, sir.

Q. Do you have any children? A. Yes, sir.

Q. Do you recall being involved in an automobile accident with the plaintiff, John Roe,—

A. Yes.

(Testimony of Kenneth Pedro.)

Q. Let me finish my question — in December, 1953, in Portland, Oregon? A. Yes.

Q. You recall that accident?

A. Yes.

Q. Were you insured against liability at the time of that accident? A. Yes.

Q. What was the name of your insurance company?

A. The Farmers' Mutual Insurance Company.

Q. Is that the same as the defendant in this case? A. Yes.

Q. Was a suit subsequently brought against you by the plaintiff, John Roe, for damages arising out of that automobile accident? A. Yes.

Q. Now, Mr. Pedro, it has been agreed here that you were personally served with a summons and complaint in plaintiff's lawsuit against you in Multnomah County on May 20th, 1954. What, if anything, did you do with that summons and complaint?

A. I mailed them in to the company.

Q. Would you describe in as much detail as you are able to recall the steps you took in mailing the papers to the company.

A. Well, I just addressed an envelope and stamped it. One thing I do remember, though, I was having a hard time spelling Enumclaw.

Q. What did you do with the envelope?

A. Mailed it.

The Court: How did you spell it?

(Testimony of Kenneth Pedro.)

A. I can't say right now. I looked it up in the policy.

Q. (By Mr. Wells): You looked it up on the policy when, Mr. Pedro?

A. When I mailed the letter, just before I mailed the letter. [4]

Q. Do you recall whether or not you put your return address on the envelope?

A. No, not for sure, but I always did, so I imagine I did that one.

Q. Were the papers of the Marshal returned to you through the mail or in any other way?

A. No, I never got them back.

Q. How long was it after you were served with the papers before you mailed them to the company?

A. I imagine it was within the day.

Q. Now, within the day of what?

A. That I made them out. I wasn't working then. I didn't have anything else to do.

Mr. Wells: Would you speak up, Mr. Pedro. I don't think the jurors at the end can hear your answers. I have no more questions.

Cross Examination

Q. (By Mr. Vergeer): Mr. Pedro, from whom did you buy this insurance policy?

A. Paul LaMond.

Q. Was he the agent that sold it to you?

A. Yes.

Q. He was the agent for the company, was he?

A. Yes, he was. [5]

(Testimony of Kenneth Pedro.)

Q. When you had your accident, Mr. Pedro, whom did you notify that you had had an accident?

A. Mr. LaMond.

Q. That is the agent? A. Yes.

Q. How far from your place does he live?

A. I really don't know how far. I called him by phone. I had his card.

Q. You had his telephone number?

A. Yes.

Q. And you had bought your insurance from him? A. Yes.

Q. You knew he was the company agent?

A. Yes.

Q. When you had your accident you called up and told him about it? A. Yes.

Q. What happened next?

A. About the next thing that happened concerning the accident, I went to trial.

Q. I didn't quite understand you.

A. I mean the next thing that happened concerning the accident, I went to trial.

Q. You went to trial? A. Yes. [6]

Q. You mean you were charged with some offense; is that it? A. Yes.

Q. I am talking now about with respect to your relations with the company. Did one of their claims men come out to see you? A. Yes.

Q. And they took a report from you, did they?

A. Yes.

Q. Did they come out soon after you called up?

A. Within a month.

(Testimony of Kenneth Pedro.)

Q. Would it have been within a week?

A. I don't think it was that soon.

Q. Anyway, they came out and made an investigation; is that it? A. Yes.

Q. Do you know how many people were hurt in this accident? Was it more than one?

A. Yes. There was a lady—I don't even remember her name.

Q. Yes, and there was a lady hurt in another car; is that right? A. Yes.

Q. Did that lady ever sue you?

A. Yes. [7]

Q. She did?

A. That is what I heard, anyway.

Q. Did you ever get a complaint and summons from that lady? A. Not that I know of.

Q. You only got one complaint and summons; isn't that right? A. I think so.

Q. The lady made a claim against you, but she didn't sue you; isn't that right?

A. She sued me or the company or somebody.

Q. You mean she made a claim? A. Yes.

Q. But you never were served by the Sheriff with more than one complaint and summons, were you? A. No, he just came that once.

Q. And you had been in contact with the local representatives of the company; you knew they had a local office, didn't you?

A. Outside of Paul LaMond I didn't know any others.

(Testimony of Kenneth Pedro.)

Q. And the claim agent who came out to see you? A. Yes.

Q. When you got this complaint and summons on the 20th of May, did you know what it was?

A. Yes. [8]

Q. Did the Sheriff's officer who brought it out explain to you what it was? A. No.

Q. But you knew what it was? A. Yes.

Q. Did you call the agent like you did when you had the accident and tell him that you had a complaint and summons?

A. No, not that time.

Q. You didn't. Did you attempt to call the claims department of the company in this city and tell them about it? A. No.

Q. You decided you would mail this to Enumclaw; is that it? A. Yes.

Q. What made you decide to do that?

A. Well, I had been told twice to mail everything I got to the company, once by LaMond and once by the guy that come out to see me.

Q. He said to send them everything that you got; is that right? A. Yes.

Q. So you say you placed this in the mail, but you don't know whether you put your return address on it or not? A. Not for sure, no.

Q. Did you put the address on it in your handwriting? [9] A. Yes.

Q. How do you think you spelled Enumclaw?

A. I don't know, but I got it off the insurance papers. I looked up the policy to get it off of.

(Testimony of Kenneth Pedro.)

Q. You had the policy there? A. Yes.

Q. You had the correct address? A. Yes.

Q. And you addressed it correctly, did you?

A. Yes.

Q. Then you did put it in the mailbox?

A. Yes.

Q. Did you do that yourself, or did you ask your mother to do it or your wife?

A. No, it would have to be me.

Q. Beg pardon?

A. It would have been me.

Q. It would have been you. Are you sure?

A. Yes.

Q. At that time where were you working?

A. I wasn't.

Q. You were unemployed? A. Yes.

Q. Did you stay home or at that address for any length of time after that? [10]

A. I am not sure just how long I stayed there but after we left there we just went out to my mother's, and I came back there every once in a while to find out if there was any mail or anything for me.

Q. Do you mean to that address? A. Yes.

Q. Was that an address where you rented home?

A. It was rented. We was staying with some people until we got squared away.

Q. You were staying with some other people there? A. Yes.

Q. Did your mother know where you were all the time during the next couple of months?

(Testimony of Kenneth Pedro.)

A. The next couple of months, yes — May and June, yes.

Q. How long did you stay in town?

A. Up to the time they start hoeing strawberries, because we went out to Sandy and got a job hoeing strawberries, whenever that is.

Q. Then from Sandy where did you go?

A. Pendleton.

Q. Pendleton? A. Yes.

Q. Did you have a permanent address of any kind there?

A. No, we was only there a few days. I heard they was harvesting beans down there, or something, and I went down [11] there to see if I could get a job. It didn't turn out so good.

Q. Where did you go from there?

A. Up in Washington, Spokane.

Q. You went to Spokane? A. Yes.

Q. How long did you stay there?

A. A couple of years, off and on.

Q. How long?

A. Quite a while. A year and a half or two years.

Q. This was all after this occurrence, wasn't it?

A. Yes.

Q. When did you leave town, do you think? This accident was in May and you were served with the complaint and summons in May. You say you left town when the strawberry crop came up?

A. Yes. I was out to my folks', and I hoed strawberries out there.

(Testimony of Kenneth Pedro.)

Q. What month do you have strawberries, do you recall? A. That I don't know.

Q. Could it be June?

A. Could possibly. I don't know for sure.

Q. After that you were here and there and then went to Spokane? A. Yes. [12]

Q. Did you make any effort at any time to let the Farmers' Mutual of Enumclaw know where you were?

A. No. I didn't see any reason why I should.

Q. You didn't know of any reason why you should?

A. No. I figured as this wreck had been settled and I didn't have any car to be insured or anything.

Q. So you were never in touch with them at any time; is that right?

A. Not after I left Portland.

Q. Whom were you living with at that time?

A. Barnes, a guy I used to work with before got laid off down there.

Q. If any of your mail was returned to that address, would you know?

A. Yes. I went back and asked them.

Q. Was that address 3403 North Albina Street, Portland, Oregon?

A. Yes, I guess it was North Albina. I don't remember the number for sure.

Mr. Vergeer: I would like to have this marked for your Honor.

(An envelope addressed to Kenneth E. Pedro, 3403 North Albina Street, Portland, Oregon)

(Testimony of Kenneth Pedro.)

and a letter dated September 3, 1954, Ralph Parr to [13] Kenneth E. Pedro, were marked by the Clerk Defendant's Exhibits 4 and 5 for Identification.)

Q. (By Mr. Vergeer): Mr. Pedro, you have been handed Exhibits 4 and 5. No. 4 is an envelope. Have you ever seen that envelope?

A. Not to my knowledge, I haven't.

Q. Is that addressed to the address you had been last staying at when you dealt with the company?

A. I should imagine that is it.

Q. You think that is right, do you?

A. I wouldn't swear to the number, but it probably is.

Q. What is the date of the postmark on that? It is on the back side, I believe.

A. September 7, 1954.

Q. And at that time were you receiving mail addressed to you at that place or was anyone receiving it?

A. I was in Spokane.

Q. Had you left a forwarding address?

A. No.

Q. That letter, then, was never delivered to you; is that right?

A. I never seen it.

Mr. Vergeer: We will offer Exhibit 4 in evidence, your Honor. [14]

The Court: Admitted.

(The envelope above referred to was received in evidence as Defendant's Exhibit 4.)

Mr. Vergeer: And I will offer Exhibit 5.

Mr. Wells: If your Honor please, I will object to

(Testimony of Kenneth Pedro.)

No. 5, which is the letter supposedly in the envelope as not being material and as not having been properly identified.

The Court: It is admitted provisionally.

(The letter above referred to was received in evidence as Defendant's Exhibit 5, subject to the above ruling of the Court.)

DEFENDANT'S EXHIBIT No. 5

The Farmers' Mutual of Enumclaw
Portland Office
512 Weatherly Building
Portland 14, Oregon
Telephone EMpire 3442
September 3, 1954

Mr. Kenneth E. Pedro
3403 N. Albina Street
Portland, Oregon

Dear Mr. Pedro:

Would you please contact my office immediately in regard to your accident of December 6, 1953.

Yours very truly,

/s/ RALPH PARR,
Ralph Parr
Portland Claim Office.

RP:m
Registered Letter
Return Receipt Request

(Testimony of Kenneth Pedro.)

Q. (By Mr. Vergeer): Did you talk to Mr. Wells when you came back to town? A. Yes.

Q. How did that come about?

A. Well, Mr. Roe had been out to my folks' and places hunting for me, and when I got back to Portland he come out there hunting for me and they told him where I was at.

Q. What is Mr. Roe's business, if you know?

A. I believe he is a policeman.

Q. He had been out to your folks' place looking for you? A. Yes.

Q. That is why you went to see Mr. Wells? [15]

A. Yes.

Q. That was not until when? 1956?

A. Yes, yes.

Q. And in the meantime you had never communicated with the Farmers' Mutual of Enumclaw?

A. No.

Q. Did you at that time when you talked to Mr. Wells make any discovery about what had happened to this lawsuit?

A. Well, what do you mean, discovery?

Q. Did he tell you what had taken place; that he had a judgment against you? A. Oh, yes.

Q. He did tell you that? A. Yes.

Q. Did you tell him to get in touch with the Farmers' Mutual of Enumclaw? A. No.

Q. You didn't. You just left it that way?

A. Yes.

Mr. Vergeer: I think that is all.

(Testimony of Kenneth Pedro.)

Redirect Examination

Q. (By Mr. Wells): Mr. Pedro, to clarify the number of times you did actually have contact with the defendant, would you recite [16] to the jury the times that you contacted the defendant or their representatives.

A. That is, the insurance company?

Q. Or Mr. LaMond or their representatives.

A. I called Mr. LaMond when I had the accident. It seems to me I called him the next day about something, and then the time the adjuster come out. Three times all told.

Q. The adjuster came out when?

A. Shortly after the wreck.

Q. Those are the three times. Did you have any other contact with them?

A. Oh, they did come down to the bakery just after I got started working down there and asked a bunch of questions.

Q. That was sometime this fall, however; is that correct?

A. It was a long time ago. It must have been six months ago or so.

Q. Did the defendant or Mr. LaMond or any of the other people that called upon you ever request you to keep the insurance company advised of your address?

A. No, not of my address.

Mr. Wells: That is all the questions I have your Honor.

(Testimony of Kenneth Pedro.)

Recross Examination

Q. (By Mr. Vergeer): They did, however, tell you to keep in touch with the [17] company, didn't they?

A. Yes. Well, if I got anything to send to them or anything.

Q. But when you found that there was a judgment against you you didn't consider it worth-while to notify them; is that right?

A. Well, I didn't have to wait long, because they was down there where I worked going through the timecards and everything else.

Q. I see. That was in September of 1956, wasn't it? A. It was this year, yes.

Q. Yes. That was just last year, this last fall. How long had you been in town when they found you?

A. Three months—three or four months.

Q. Actually, hadn't you gotten back to town about in January or February of '56?

A. I come down Christmas before last. My wife's father died. That is when we come back down, and then we went back to Spokane and got out furniture and stuff a couple of months later and come back. We finally got settled about March, I guess it was.

Q. And they found you in September; is that right? That is when they came and took the statement from you; isn't that correct?

A. I don't know. I couldn't swear to that. [18]

Mr. Vergeer: I think that is all.

Mr. Wells: No more questions, your Honor.

(Witness excused.)

Mr. Wells: Plaintiff rests, your Honor. [19]

Defendant's Evidence

ALMA KLUDT

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Is that Miss or Mrs. Kludt? A. Mrs.

Q. Mrs. Kludt, by whom are you employed?

A. By the Farmers' Mutual Insurance Company of Enumclaw.

Q. Where are you employed?

A. Presently in Salt Lake City in their branch office.

Q. In the branch office in Salt Lake City?

A. That is right, yes.

Q. Will you tell the jury where you were employed along about in May and June of 1954.

A. In the home office of Enumclaw.

Q. What were your duties there?

A. Well, I was head of the claims department of the girls, that is, at that time.

Q. As such did you have any duties with reference to incoming mail?

A. Yes, I did. The claims mail was always brought to my desk, and I would usually take care

(Testimony of Alma Kludt.)

of it. If there were any legal documents, I definitely would take care of them. [20]

Q. You received all legal documents that were received in the mail; is that correct? A. Yes.

Q. When you received a legal document—if you were not there, who did it?

A. The girl next to me, Mrs. June Semprimog-sik.

Q. That was the other girl on the desk, and if you were not there she did it; is that right?

A. That is right.

Q. Now, were you on that desk from the 1st of May until the end of July of 1956? I am not asking how long you were, but during that time were you?

A. Yes.

Q. In 1954? A. Yes.

Q. All right. Did you keep any kind of a log of any legal documents received by the company during that time?

A. Yes. We had what we called our summons and complaint book in which we entered every summons received.

Q. Every summons that was received in the office? A. Yes, as they were received.

Mr. Vergeer: I wish you would hand to the witness Exhibits 1, 2 and 3, if you will.

Q. Mrs. Kludt, can you tell the jury what these exhibits are? [21]

A. Yes. These are copies of pages from our summons and complaint book.

Q. Are they photostatic copies? A. Yes.

(Testimony of Alma Kludt.)

Q. Are they true and correct copies?

A. Yes.

Q. Is that a part of the log that you kept?

A. Yes, it is.

Q. Is there any other log whatever covering that period of time? A. No.

Q. And was every summons and complaint, or summons, either one, received in the mail in your office listed on those documents during the period that they cover? A. Yes, they were.

Q. What period of time do they cover?

A. Well, from the 19th of February of '54 clear through July, '54.

Q. That is, through the end of July?

A. Yes.

Q. Of 1954. At anytime or at any place in the log is there listed any complaint or summons in which Kenneth Pedro is the defendant?

A. There is not.

Q. Or an insured? [22] A. There is not.

Q. Was there any complaint or summons received in your office from Kenneth Pedro?

A. Not to my knowledge.

Q. If there had been, it would be listed on there? You are positive of that? A. I am positive.

Mr. Vergeer: We offer Exhibits 1, 2 and 3, your Honor.

The Court: Admitted.

(The three photostatic copies of sheets headed "Summons and Complaint 1954," were

(Testimony of Alma Kludt.)

received in evidence and marked Defendants' Exhibits 1, 2 and 3, respectively.)

Mr. Vergeer: You may inquire.

Cross Examination

Q. (By Mr. Wells): Mrs. Kludt, I believe you stated the claims mail was dropped on your desk?

A. Yes.

Q. Or on the desk of your associate who is next to testify; is that correct? A. Yes.

Q. Who dropped the mail on your desk? [23]

A. Well, the secretary of the company. She would get the mail after the mail clerk picked it up at the Post Office, then she would sort it as to departments, and all claims mail was brought to my desk.

Q. Did you have more than one mail clerk?

A. No.

Q. The mail was not delivered to your office; it was picked up at the Post Office?

A. Picked up, yes.

Q. Was that done every day?

A. Yes. In fact, twice a day.

Q. Then next it was delivered to the secretary of the company; is that correct?

A. The secretary of the secretary of the company.

Q. The secretary to the secretary? A. Yes.

Q. And the secretary to the secretary sorted it; is that correct? A. Yes.

(Testimony of Alma Kludt.)

Q. Did the secretary to the secretary who sorted the mail have any assistants helping in this matter?

A. No.

Q. She did it all by herself every day?

A. Yes.

Q. Did the mail clerk ever sort the mail, as far as you know? [24]

A. No.

Q. Did the person who sorted the mail ever have anybody else deliver it to the various departments?

A. I don't think so. I don't ever remember anybody else doing it.

Q. But you are not sure?

A. Well, I am just trying to remember whether she was ever absent. No, I believe she did it all the time.

Q. Is there more than one place at your office at which the secretary would be delivering mail?

A. Oh, yes; quite a few departments.

Q. How many would you say there were in 1954?

A. Oh, perhaps a half a dozen.

Q. Beg pardon?

A. A half a dozen different places.

Q. Of course, all you have been testifying to with respect to receiving the summons and complaint from Kenneth Pedro is as to documents which were brought to your desk; is that correct?

A. That is right.

Q. How long have you been with the company, Mrs. Kludt?

A. Since July 1st of 1952.

Q. Had you been working in the head office from the beginning of your employment?

(Testimony of Alma Kludt.)

A. From the beginning until July of '55. [25]

Q. Were you working in the claims department during all that time?

A. From July 1st, 1952, until January of 1955.

Q. You were in the claims department?

A. Yes.

Q. Were you in the same position in the claims department as you were at all times?

Let me rephrase the question: Did you also have the same responsibility in the claims department with respect to receiving summons and complaints and noting them on the log?

A. No. For about a year after I started to work another girl was my predecessor. She would take care of those things.

Q. For a while you were her assistant; is that it?

A. Yes.

Q. Is the head office located in one building?

A. Yes.

Q. By itself. There are not other offices in that building, are there? A. No.

Q. That was true in May, 1954? A. Yes.

Q. Is there more than one floor, the head office?

A. It is now, yes.

Q. But it was not in May, 1954? [26]

A. I can't remember when they built the addition.

Q. Approximately how many employees would you say were employed at the head office in May, 1954?

A. I couldn't say. I don't remember.

(Testimony of Alma Kludt.)

Q. Did you receive any other correspondence besides summons and complaints?

A. Well, all claims mail, anything pertaining to claims.

Q. That would be from other branch offices of the company as well as from claimants?

A. Yes.

Q. How much mail would you say you received on an average basis in 1954?

A. That would be hard to estimate.

Q. Would it be considerably more than as shown in the log exhibits, Nos. 1, 2 and 3? Would it be considerably more than in the documents that are listed?

A. Well, yes. Those are just our summons and complaints. The rest of the claim mail was certainly more than the summons we received.

Q. Does the summons and complaint part of it comprise only a small part of your incoming mail?

A. Yes, of all mail, that is right.

Q. In what order are the summons and complaints listed in the logbook?

A. Well, it has been quite a while. [27]

Q. I will hand you one of these.

A. It would be the policy number.

Q. No, I mean in what chronological order.

A. Oh, according to when they were received, as we received them in the office.

Q. As they were received by the company?

A. Yes.

Q. There is a column on here marked "Dat

(Testimony of Alma Kludt.)

Served." Does that refer to the date they were served upon your assured or the date they were received by the company?

A. The date they were served upon the assured.

Q. How did you have that information?

A. A lot of them were stamped served at such-and-such a date, with the certain Sheriff's stamp or something. There was quite a few that were not, and then we left those blank.

Q. I notice there are some blanks left with respect to dates served.

A. If we didn't know, we just left them blank.

Q. Is it not indicated somewhere on the logbook as to the date these various summons and complaints were received? A. No.

Q. How is it you can identify these papers as covering the period February to July, 1954?

A. Well, there are some there with the stamp received a certain date, and then as we received them, why, we always [28] entered them so we know that we received them in that time.

Mr. Wells: Thank you.

Redirect Examination

Q. (By Mr. Vergeer): Mrs. Kludt, I wanted to ask you about the secretary who actually received or sorted the mail. What was her job before she received and sorted the mail?

A. She had been doing my job.

Q. I see. Now, when you arrived you worked a

(Testimony of Alma Kludt.)

year under that girl while she did the job on the claims desk; is that right? A. Yes.

Q. Then you moved to the claims desk and she thereafter sorted all the mail? A. That is right.

Q. And delivered it to the claims desk; that is, all those matters pertaining to the claims department? A. That is right.

Q. But she spent at least a year that you know of doing the job you were doing?

A. That is right, yes.

Q. She knew a summons and complaint when she saw it? A. Oh, she sure did.

Mr. Vergeer: That is all.

(Witness excused.) [29]

JUNE SEMPRIMOGSIK

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Is that Miss or Mrs. Semprimogsik? A. Mrs. Semprimogsik.

Q. Where do you work?

A. I am employed at the Farmers' Mutual of Enumclaw in the home office at Enumclaw, Washington.

Q. By the way, where is Enumclaw, Washington?

A. That is a real pretty little town near——

Q. It is about 20 miles south of Seattle, isn't it?

A. That is right.

(Testimony of June Semprimogsik.)

Q. And about 10 or 15 miles east of the main highway to Tacoma; is that right?

A. That is right.

Q. All right. Now, what were your duties at that place during the months of May, June and July of 1954?

A. I was employed in the claims department, and I was under Mrs. Kludt.

Q. The lady who just testified?

A. That is right. She was my boss and I was next in line to her.

Q. If she were absent at any time, what were your duties? [30]

A. I would take over as supervisor of personnel in our department and perform all her duties that she had done.

Q. Did that include the duty of sorting the mail and listing any received complaints or summons in the log?

A. That is right.

Q. If she were not there, you were there; is that right?

A. That is right.

Q. Was there any time during those months that you might both have been absent?

A. No, not at that time.

Q. During those months there was definitely one or the other of you there every day?

A. Yes.

Q. Have you seen Exhibits No. 1, 2 and 3, which comprise the log? I think you have.

A. Yes.

Q. Have you examined the log that was kept during that time?

A. Yes.

(Testimony of June Semprimogsik.)

Q. Was any complaint or summons received through the mail by the company in which Mr. Pedro was a defendant? A. No.

Q. Or in connection with any policy of his?

A. No.

Q. How many people were employed in the office about that [31] time? Do you have any idea?

A. I would say about 70.

Q. About 70 people?

A. Or 75 in our whole home office.

Q. That is the entire home office? A. Yes.

Mr. Vergeer: You may inquire.

Cross Examination

Q. (By Mr. Wells): Mrs. Semprimogsik, was the claims mail put on your desk or on Mrs. Kludt's desk during the period from May to July, 1954?

A. It was on Mrs. Kludt's desk.

Q. When Mrs. Kludt was absent you would then take the mail from her desk; is that right?

A. No, I always would work at her desk. I would take it up to her desk.

Q. Was the mail which was put on Mrs. Kludt's desk ever opened before it was put on the desk?

A. I believe some of it they do have an automatic opener. Some of it could have been—I don't know just what could have been opened——

Q. Beg pardon?

A. I don't know just what could have been opened or unopened [32] by this automatic opener.

(Testimony of June Semprimogsik.)

Q. The mail is opened by a machine; is that correct?

A. Some of it was. We have some stamped envelopes, self-addressed envelopes, that we do send out claims, and it definitely goes—I believe some of that may have been opened on the machine.

Q. Now, when sorting mail out not every envelope is so addressed that it is apparent that it is for the claims department, is it?

A. Most of the correspondence is "Attention Claims Department."

Q. Unless there is some indication, however, on the envelope, you would not know which department it would go to, would you?

A. Well, I would imagine that it is opened then.

Q. Do you imagine that the secretary of the company opened the mail and then determined which department it went to?

A. Yes.

Q. And sorted it. So that the mail had been opened before it came to the claims desk; isn't that correct? A. Yes.

Q. The papers had been taken out of the envelope; is that correct?

A. I don't believe that it was ever taken out and clipped, [33] no. It would come intact.

Q. It was put back in the envelope before it was delivered to your desk; is that right? A. Yes.

Q. Is it possible that incoming mail in this period we are speaking of could have been sorted improp-

(Testimony of June Semprimogsik.)

erly and delivered to the wrong department in the company?

A. Sometimes claims correspondence is sent to another department, but it always reaches our department within that day, because incoming mail is handled daily.

Q. Is it possible that incoming mail during this period may have become lost by accident or thrown away by mistake? A. Highly improbable.

Q. But it is possible, isn't it? A. No.

Q. Is it possible that a summons and complaint that was received during this period could have been mixed up with wastepaper and discarded?

A. No.

Mr. Wells: That is all the questions I have.

Redirect Examination

Q. (By Mr. Vergeer): Has there ever been a summons and complaint missing from the office?

A. Never.

Mr. Vergeer: That is all.

(Witness excused.) [35]

RALPH W. PARR

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Mr. Parr, what is your name, please? A. Ralph W. Parr.

(Testimony of Ralph W. Parr.)

Q. By whom are you employed, Mr. Parr?

A. Farmers' Mutual Insurance Company of Enumclaw.

Q. Were you employed by the Farmers' Mutual Insurance Company of Enumclaw in the early part of 1954? A. Yes.

Q. What is your function?

A. I am a claims adjuster.

Q. In connection with your work as a claims adjuster did you have occasion to meet Mr. Pedro, who testified here? A. Yes.

Q. About when was that?

A. Oh, it wasn't too long after the accident. I believe about towards the end of December.

Q. Was that in '53? A. '53.

Q. When was the accident, do you know?

A. I believe it was in December, the first week in December.

Q. And you met him sometime in December of 1953? [36] A. Yes.

Q. In connection with the accident, was it?

A. Yes.

Q. Did you give Mr. Pedro any instructions?

A. Yes, I talked to him quite some time on the porch of the house. As I recall, I believe he was having furnace trouble at that time, and I gave him instructions on the accident, and also gave him a card and told him if he got any incidental papers or anything to mail them to me at the office in Portland.

(Testimony of Ralph W. Parr.)

Q. Did you tell him he was to keep in touch with the company until this matter was disposed of?

A. Yes, I did, because there was personal injuries in it.

The Court: Because of what?

A. There was personal injuries in the case.

Q. (By Mr. Vergeer): Did you thereafter have occasion to see Mr. Pedro at any other time?

A. No.

Q. Did you have occasion to discuss the claims—were there more claims than one? A. Yes.

Q. How many claims were there?

A. There was two injury claims in it, two separate cars.

The Court: It was a three-car collision?

A. Yes. [37]

Q. (By Mr. Vergeer): Did attorneys represent each of the claimants? A. Yes.

Q. Who represented the plaintiff in this case?

A. Mr. Wells.

Q. And who represented the other claimant?

A. I believe it was Mr. Bernstein.

Q. Now, did you negotiate for the settlement of these claims? A. Yes.

Q. And were you successful with any of them?

A. With Mr. Bernstein's claim only.

Q. That claim was settled, was it? A. Yes.

The Court: Whom did you negotiate with in this case?

A. Mr. Wells.

Q. (By Mr. Vergeer): Then before you found

(Testimony of Ralph W. Parr.)

that there was a complaint and summons in this case, when was the last time you had seen Mr. Wells?

A. I believe I talked to him on the phone and we discussed it. And, of course, any demand that he made at that time I had to submit it to the home office for authority to settle, and we were trying to get medical reports and information from him, and a list of specials. Then the thing kind of just more or less died right there. [38]

The Court: You didn't give the date he asked for.

A. It would be hard for me to judge, but it would be, oh, probably sometime in January or February.

Q. (By Mr. Vergeer): Of 1954? A. Yes.

The Court: When was the case filed?

Mr. Vergeer: May 20th, your Honor, was the date of service.

Q. Did you know at any time that this action was filed until after there was a judgment in it?

A. No, I didn't.

Q. Did Mr. Wells ever get in touch with you to inform you that an action had been filed against the company? A. No, he didn't.

The Court: Did he tell you he was going to file one? A. No, he didn't.

Q. (By Mr. Vergeer): How did you learn that there was a judgment against this defendant Pedro?

A. A letter from Mr. Wells.

Q. About when was that?

(Testimony of Ralph W. Parr.)

A. The letter would be in the file. I don't remember.

Q. Would you like to refresh your memory?

A. Yes.

Mr. Vergeer: May this be handed to the witness your Honor? [39]

The Court: Yes.

A. This is——

Q. (By Mr. Vergeer): When was it that Mr. Wells notified you that there was a judgment?

A. It would be September 1st of 1954.

Q. This was mailed to an agent's office on North Montana Avenue, who in return called me and notified me of this correspondence and then brought it in to me.

The Court: What was his name?

A. Mr. Woods.

The Court: The agent?

A. Yes.

Q. (By Mr. Vergeer): Now at any time during the intervening period did Mr. Wells notify you that he was filing an action or that an action had been filed? A. No, sir.

Q. Or that he intended to take judgment?

A. No, sir.

Q. You heard nothing of that?

A. Not one thing.

Q. Then you were notified that there was judgment; is that right? A. Yes.

Q. When is the next time you saw Mr. Pedro?

A. Well, I was looking for him for quite some

(Testimony of Ralph W. Parr.)

time, and [40] it wasn't until just recently—I believe it was in the past two or three months—that we finally found him.

Q. To refresh your memory, could that have been in September?

A. It possibly could, yes.

Q. Was a statement taken from him at that time? A. Yes, it was.

Q. And Mr. Crookham was with you?

A. Yes, he was.

Q. Now, in the meantime did the company have an investigation made in an attempt to locate Mr. Pedro?

A. Yes, I tried to locate him, and not having too much time I requested the company to call in a private investigating concern to try and locate him. And I think that file will reflect——

Q. Never mind that. Did you get a report from such an investigator as to the matters that had been covered in the investigation? A. Yes.

Q. I will hand you Exhibits 6, 7 and 8, Mr. Parr, and ask you if that is a report that you received.

A. Yes, it is.

Q. From whom did you finally discover where Mr. Pedro was?

A. Well, I think it was through Mr. Crookham advising me that he was in town. [41]

Q. Mr. Crookham advised you? A. Yes.

Q. That is the first you heard about that?

A. Yes.

(Testimony of Ralph W. Parr.)

Q. That was just before you went and took the statement from him, and that was in 1956?

A. Yes.

Mr. Vergeer: I would like to offer that report your Honor.

The Court: If it is objected to, I will sustain the objection.

Mr. Wells: That is objected to, your Honor.

The Court: Objection sustained.

Mr. Vergeer: All right.

Q. Who made this report, by the way?

A. I believe it was the Retail Credit Investigation, isn't it?

Mr. Vergeer: If you know. I couldn't testify I think that is all. You may inquire.

Cross Examination

Q. (By Mr. Wells): Mr. Parr, did you ever call upon me personally? A. No.

Q. You had several telephone conversations with me, however? [42]

A. Yes.

Q. How many telephone conversations do you recall having with me?

A. It has been quite some time.

Q. Would you say more than one?

A. Yes, I would say more than one.

Q. Would you say as many as four?

A. Well, I had in mind about three.

Q. When would you say was the last telephone conversation?

(Testimony of Ralph W. Parr.)

A. I don't believe that I could accurately say, it has been so long.

Q. You don't recall; is that it?

A. No. I believe that I would have written a report on it when I did talk to you.

Q. Did you receive any correspondence from me other than the letter directed to the Farmers' Mutual of Enumclaw which you have identified?

A. I don't believe so.

Q. What was your address in March, 1954?

A. We had a claims office in the Weatherly Building.

Q. 512 Weatherly Building? A. Yes.

Q. But you don't recall receiving any other letters from me; is that correct?

A. No. I was alone in the office, and I don't [43] remember all the correspondence I received.

Q. Are the papers with you here in the courtroom today? A. I presume that they would be.

Q. From them could you ascertain whether or not you did receive other correspondence from me?

A. I assume that I may.

Mr. Crookham: Would you hand this to the witness, please.

(A file was handed to the witness.)

Q. (By Mr. Wells): Specifically, I will ask you if you received a letter from me dated April 7, 1954, and a letter from me dated March 29, 1954?

A. What was the first date, sir?

Q. April 7, 1954.

(Testimony of Ralph W. Parr.)

The Court: Is that file in chronological order?

A. Yes.

The Court: Did you write him a letter on April 7, 1954?

Mr. Wells: Yes, your Honor, and one dated March 29, 1954.

The Court: Have you got copies of them?

Mr. Wells: Yes.

The Court: I am going to quit pre-trying these cases outside of the courtroom, if you don't exchange your exhibits with each other and record them in your orders. That is the [44] very point of pre-trial, so we don't come in here and have to take everybody's time looking through a big file. You can put those copies in. I am not going to wait for him to hunt up the originals.

Mr. Wells: All right, your Honor. We would like to have the copies marked for identification and offer them in evidence.

Mr. Vergeer: Certainly we have no objection to their admission.

The Court: They are admitted.

(Copies of the letters above referred to, dated March 29, 1954, and April 7, 1954, Carl Robert Wells to Ralph Parr, were thereupon marked and received in evidence as Plaintiff's Exhibits 10 and 11, respectively.)

PLAINTIFF'S EXHIBIT No. 10

(Copy)

March 29, 1954

Mr. Ralph Parr,
Farmer's Mutual of Enumclaw,
512 Weatherly Building,
Portland, Oregon.

Re: Your insured, Kenneth E. Pedro; Loss of
December 6, 1953; John L. Roe, claim of.

Dear Sir:

Confirming our telephone conversation of March
29, 1954, we represent John L. Roe in his claim for
personal injury arising out of an automobile acci-
dent on December 6, 1953, with your insured, Ken-
neth E. Pedro.

Mr. Roe is a city policeman and was driving a
police patrol car at the time of the accident. We
understand that he had stopped the police car
headed south on the 3600 block of North Mississippi
Avenue, preparatory to backing into a parking
space. A car driven by Adolf G. Sundberg had
stopped about ten feet behind the police car, when
your insured, also driving a car south on Missis-
sippi Avenue, crashed into the rear of the Sundberg
car, knocking it forward and into the rear of the
police car. It appears that your insured was intoxi-
cated at the time of the accident.

Mr. Roe states that his head was whipped back-
wards by the impact causing injury mainly to his
neck. He states that his hearing in his left ear was
impaired for about three days by an aching, ring-

ing and dullness. In addition, he strained the muscles of his neck, shoulders and back. He was treated by Dr. Edward C. Parkinson, 7313 N. Leavitt Avenue, who stated to us on March 2, 1954, that his ear and neck complaints had cleared up but that his back pain persisted "improving, but outcome undetermined for another two months; still requires Rest and treatment at intervals."

We have not discussed settlement with Mr. Roe but he has, however, requested us to pursue his claim pending settlement. We would recommend settlement for \$1,750.00.

Very truly yours,

McCormick, Wells & Fulop,

CRW/hm Carl Robert Wells.

PLAINTIFF'S EXHIBIT No. 11

(Copy)

April 7, 1954

Mr. Ralph Parr
Farmers' Mutual of Enumclaw
512 Weatherly Building,
Portland, Oregon

Re: Your insured, Kenneth E. Pedro; Loss of
December 6, 1953; John L. Roe, claim of.

Dear Mr. Parr:

Enclosed is a copy of the medical statement received from Dr. Parkinson regarding John L. Roe. As you can see, it is the briefest kind of a statement and hardly satisfactory. It was, however, the

best that I could worm out of them and it took a long time to get.

I called Dr. Parkinson's office today to get more details. I was informed by them that Roe was treated at Dr. Parkinson's office several times and also that x-rays were taken at Emanuel Hospital. They stated that the otitis or the ringing, aching and dullness in the left ear was caused by the accident and not by a previously existing infection. They also stated that the symptoms from this type of injury are often progressive; that is, all the complaints do not usually appear immediately after the accident, but may crop up as late as 12 months or more afterward.

Very truly yours,

Carl Robert Wells.

CRW/hm

Encl.

Re: Mr. John L. Roe

Diagnosis:

1. Mild otitis, external, left.
2. Strain, subsidiary neck muscles. (Splenius capitus.)
3. Subsequent complaint on 12-28-53 with discomfort and pain, low back, onset 12-10-53.

Treatment:

Examination

Therapy

Two Rx's

Follow-up care

Prognosis:

1. and 2. are healed.

3. improving, but outcome undetermined for another two months.

Still requires Rx and treatment at intervals.

Edward C. Parkinson, M.D.

R. Blessing, R.N.

Mr. Wells: That is all the questions I have.

Mr. Vergeer: That is all. [45]

(Witness excused.)

CHARLES S. CROOKHAM

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Mr. Crookham, you are an attorney, are you? A. Yes, sir.

Q. You are associated with me in my office?

A. I am.

Q. Did you have any connection with this lawsuit during its preparation? A. I did.

Q. And in that connection did you have occasion to prepare some interrogatories for the plaintiff? A. Yes, sir.

Q. Did any of those interrogatories have anything to do with the location or whereabouts of Mr. Pedro?

A. Yes. The interrogatories were directed to Mr. Wells and desired to know from him certain information on which he was going to rely on his side of the case, and particularly what information

(Testimony of Charles S. Crookham.)

would rely on in regard to the forwarding of the summons and complaint to the company, if there was such information. And then I might say that those were objected to by Mr. Wells, and a hearing was had before Judge Solomon, I think, on the 10th of September, 1956.

Q. At that hearing did Mr. Wells tell you where Mr. Pedro could be located?

A. At that time and for the first time, from the file, to my knowledge, Mr. Wells informed me that Mr. Pedro was back in town and had been back in town for some number of months. And subsequently, based upon knowing that he was back in town, Mr. Parr and I were able to locate him and make the statement we have referred to.

Mr. Vergeer: May I have that exhibit?

Mr. Crookman: I have that as a sealed exhibit for impeachment purposes only.

Mr. Vergeer: As long as it is a sealed exhibit, we won't introduce it at this time.

Q. That is when you took the statement from Mr. Pedro that has been referred to?

A. That was the 13th of September, 1956.

Q. And your information as to his whereabouts came from Mr. Wells?

A. Yes, Mr. Wells indicated he was back in town.

Mr. Vergeer: That is all.

Mr. Wells: No questions.

(Witness excused.)

Mr. Vergeer: We would like to call Mr. Wells your Honor.

Mr. Wells: I will object to that, your Honor.

The Court: Why?

Mr. Wells: Because here I am representing the plaintiff, and if it is going to involve me whatsoever as to confidential and privileged communications——

The Court: We will hear what is involved when we get his questions.

CARL R. WELLS

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Mr. Wells, you are an attorney, are you not? A. Yes.

Q. You are representing the plaintiff in this case? A. Yes, I am.

Q. When did you first start to represent this same gentleman? A. Mr. Roe?

Q. Yes.

A. Sometime shortly after the automobile collision with Mr. Pedro.

Q. Was that in December of 1953? [48]

A. I believe it was.

Q. Now, thereafter did you have occasion to talk to Mr. Parr on the telephone? A. Yes.

Q. You knew, did you, who was the insurance

(Testimony of Carl R. Wells.)

carrier that carried insurance on Mr. Pedro's car?

A. I understood it was the Farmers' Mutual of Enumclaw.

Q. Yes. And then you talked to Mr. Parr about it? A. Right.

Q. And you had written Mr. Parr at least two letters which are now in evidence; is that right?

A. That is right.

Q. When you filed the complaint in this case did you notify Mr. Parr that you were filing the complaint?

A. You mean the complaint in the case of John L. Roe vs. Farmers' Mutual Insurance Company?

Q. That is correct. A. No.

Q. As a matter of fact, you didn't inform the company that you were filing a complaint or had commenced any litigation until after you had taken the default judgment; isn't that right?

A. You are referring to the case of John L. Roe against the Farmers' Mutual Insurance Company?

Q. That is correct,—no, I am referring to the case of [49] Roe vs. Pedro.

A. Well, I believe my answer to your previous question was based on the other case.

Q. Let's back up, then. Did you inform Mr. Pedro or the company in any manner that you were filing this action by Mr. Roe against Pedro?

A. Only in this respect: That when Mr. Parr, in response to my letter of March 29th, 1954, which was written after we had filed the case against Mr. Pedro—Mr. Parr called me and told me he thought

(Testimony of Carl R. Wells.)

that the plaintiff didn't have a good claim, and he was irritated with the language in my letter which stated we were going to pursue our claim pending a settlement. And I asked him at that time if he knew where I might serve Kenneth Pedro, and he told me—or I asked him for his address and he told me it was on North Albina Street.

Q. But you didn't tell him after you had filed the complaint, and when you received no reply thereto or answer or other appearance you did not call him and get in touch with him, did you?

A. To my best knowledge, after our telephone conversation of a day or two after my letter was written, I had no other communication with Mr. Parr.

Q. That is right. But you did communicate with him after you had taken judgment? [50]

A. I made a demand on the company and apparently that was forwarded to Mr. Parr.

Q. How long after you took the judgment did you do that?

A. The date will appear on the letter. I don't remember.

Mr. Vergeer: All right. That is all.

(Witness excused.)

Mr. Vergeer: That is our case, your Honor.

The Court: Do you have rebuttal, Mr. Wells?

Mr. Wells: If your Honor please, may I have a couple of minutes recess to find out if I do have rebuttal?

The Court: Yes. We will all stay in the courtroom.

(Short recess.)

The Court: Is there anything here that shows when the case was filed against Pedro?

Mr. Wells: I have a receipt from the Court Clerk, your Honor, showing the date the complaint was filed.

The Court: When was it?

Mr. Wells: March 17th, your Honor.

The Court: When did Pedro say he was served?

Mr. Crookham: May 20th.

The Court: Is there anything that shows where he was served, what county?

Mr. Crookham: He was served in Multnomah County, your Honor. [51]

Mr. Wells: We have no rebuttal, your Honor.

The Court: There has been no dispute about the dates there? This exchange of dates is agreed?

Mr. Vergeer: That is right. If Counsel says so, I assume that is correct.

The Court: Now, Ladies and Gentlemen, I don't know whether this is going to be good news for you or bad news. I never submit cases these days, especially in this kind of weather, to juries in the afternoon. I am simply not going to have our womenfolk kept here after dark. This being Friday, that means that this case will have to go over until Monday when it will be finally submitted to you. I am not going to ask you to come back tomorrow. You will have to come back Monday anyhow on account of other cases that are for trial in the court. So you

may go now until Monday morning at 9:00 o'clock. Be in this courtroom at 9:00 o'clock Monday morning. I hope the rain-makers meanwhile have been correct that the weather will become more like Western Oregon weather.

Do not discuss this case among yourselves or with others or permit it to be discussed in your presence until it is finally submitted to you.

(The jury was excused from the courtroom and thereafter the following occurred [52] out of the presence and hearing of the jury:)

The Court: I suppose you gentlemen want to discuss some law. I really don't know where I am in this case. Do you want to come back this afternoon? It is a quarter of 12:00 now. Do you want to be heard at some length, either one of you?

Mr. Wells: I don't particularly care to be heard, your Honor.

Mr. Vergeer: I have a few matters I would like to call to the Court's attention. I don't think it would take very long, but it might be better to come back at 2:00.

(Thereupon a recess was taken until 2:00 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows, out of the presence and hearing of the jury:)

Mr. Vergeer: I understood, your Honor, that Counsel did not want to be heard at this time, so I assume that I will discuss this matter first.

I would like to present and offer into evidence

this policy which it is agreed in the pre-trial order may be offered. [53]

The Court: Will you mark it.

(The insurance policy referred to was marked and received in evidence as Defendants' Exhibit 9.)

Mr. Vergeer: Now, with respect to the law in this matter, my motion which I originally intended to make this morning was to the effect that we should be entitled to judgment based upon the pre-trial order. The matters and things that I am going to call to the Court's attention touch equally upon that subject and upon the law generally of the case. Therefore, there is no need to differentiate.

It is the theory of the plaintiff in this case, apparently, that we have the burden of proving that the insured did not send the summons and complaint to us; that is, within the meaning of the policy and in compliance with the policy, and also that the insured did not cooperate with us.

First of all, I would like to take issue as a matter of law with those propositions. The conditions of the policy the Court will find stated herein, but I wanted to call the Court's attention particularly to the Oregon case of Hoffman vs. Employers' Liability Assurance Company, 146 Oregon at Page 66. That case, which is a local case, I think would tend to govern the situation here, and it distinctly points out that the proposition is really that the [54] insured must show performance of all the conditions of the policy before he can recover.

Now in this particular instance we have a situation where the plaintiff, of course, is in the position of the insured if he is entitled to recover in this case. So it was our thought that it would be necessary for the plaintiff to allege that he had performed all conditions precedent and all conditions of the policy as a condition of his being permitted to proceed with this case and to collect under the policy.

(Further discussion between the Court and Counsel.)

(Thereupon an adjournment was taken until Monday, January 21, 1957, at 9:00 a.m.) [55]

Portland, Oregon, January 21, 1957

(Court reconvened, pursuant to adjournment at 9:00 o'clock a.m., and proceedings herein were resumed out of the presence and hearing of the jury, as follows:)

The Court: Gentlemen, did you want to talk some more about the things we were talking about Friday?

Mr. Vergeer: Not at this time.

Mr. Wells: No, your Honor.

The Court: I was talking to Mr. Beckwith over the telephone, and I asked him to give me some dates out of the record that might be controlling. The accident was December 6th, 1953, and suit was commenced sometime before March 29th, 1954. Do you know when it was, Mr. Wells?

Mr. Wells: March 17th, your Honor.

The Court: I notice there is an endorsement of change of address on the policy. Pedro was served

on May 20th. Default judgment was taken July 30th. Is there anything in the record to tell when Pedro learned of the judgment?

Mr. Wells: Not that I know of.

Mr. Vergeer: He testified, your Honor, that he did when he returned to Portland and Counsel called him. That was in 1956, if I remember correctly.

Mr. Wells: That may be correct, your Honor.

Mr. Vergeer: Yes, it was in the summer of '56, your Honor.

The Court: When did the insurance company learn of the judgment?

Mr. Vergeer: That was in the fall of '56, your Honor.

Mr. Wells: September 1st, 1954, according to Mr. Parr.

Mr. Vergeer: That is correct. That is when we located Mr. Pedro, is what I am getting at.

The Court: You say you located him then?

Mr. Vergeer: No, we located him in the spring of '56, your Honor — pardon me — in the summer of '56.

The Court: You learned of the judgment September 1st, 1954?

Mr. Vergeer: Yes. We discovered Pedro September 15th of '56.

The Court: After he returned from Spokane?

Mr. Vergeer: Yes, your Honor.

The Court: Your point on cooperation seems to me to be that you had a year under the State statute, a year from July 30th, 1954, in which to move

to set aside the judgment on the grounds of fraud or excusable neglect, whatever the statute is or that.

Mr. Vergeer: That is right, your Honor.

The Court: That time ran out one year later July 30th, 1955. And you didn't know where Pedro was until after that [57] in '56, but you did know on September 1, 1954, that a judgment had been taken.

Mr. Vergeer: Yes, your Honor.

The Court: Why couldn't you have moved then?

Mr. Vergeer: It was impossible to move then. His affidavit is necessary and so is his answer. The motion must be accompanied by the answer which would necessarily be signed by him in the State Court, by the party. It has to be verified by the party in the State Court.

The Court: I think that is a doubtful question. I find it pretty difficult to pass on it. I should think that as of that time on the showing you could have made the State Court would have subrogated you to the defendant's position. You never can find out until you try, Mr. Vergeer.

Mr. Vergeer: That is possibly true, your Honor. I don't want to delay this thing unnecessarily, because the Court is probably familiar with the statute which calls for the affidavit of the party to set aside a default, my understanding is, and also the answer in the State Court must be verified by the party.

The Court: Yes. Suppose he had died or become insane?

Mr. Vergeer: Then it would have to be verified by his successor-in-interest, of course. Now the insurance company would not have been permitted to be a successor-in-interest in any sense in the State Court. [58]

The Court: You are a subrogee, aren't you?

Mr. Vergeer: Yes, as subrogee. I withdraw that to that extent, yes. But certainly not as a party in interest in an action for damages of this kind.

Mr. Wells: If your Honor please, I believe the State statute allows the attorney to verify the complaint where the party is out of the county. I am not familiar with the statute relating to the setting aside of a default judgment. However, it occurs to me that the primary reason why the defendant would not want to appear in the State Court would be that by making its appearance it might waive its right to claim as against the insured that he did not comply with all the policy conditions.

The Court: I think this is a very confused situation. I am going to have a good deal of trouble if I try to instruct on the cooperation end of it. I don't see anything else in here on the facts.

Mr. Vergeer: His failure to let us know where he was. Yes, that is right, your Honor. That is a question of cooperation.

The Court: I should think his good faith would be a factor there and the reasonableness of his conduct. If I do instruct, that is the way I will talk to the jury. You can argue the cooperation point. I haven't quite made up my mind on that. I will be glad to hear what you have to say [59] as to the

forwarding of the suit papers. That presents a fact question. I agree with you he has the burden of proof that he forwarded them, but I don't agree with you that goes to the extent that he has to show that they were received by the company. It is open to you, of course, to argue that because you didn't receive them he didn't forward them.

All right. Bring in the jury.

(Thereupon the jury returned to the courtroom, counsel for the respective parties made arguments to the jury, and thereafter the Court instructed the jury as follows:)

The Court: Ladies and Gentlemen, it appears to me that there are two controlling fact questions in this case for your decision. The policy provides that in the event of a suit against the insured growing out of an accident that the insured shall immediately forward all suit papers to the insurance company.

Now, there is room for a difference of opinion as to what that means. My view of it is that if the young man who was on the witness stand, who was the insured, did what he claims he did right away after the papers were served on him, put them in the mail and addressed them to the insurance company at its home office, which he says he [60] took from the policy, put the necessary stamps on the envelope and put on a return address, that is all he was required to do.

The company says it never received the papers. I repeat that it is my view that all the insured had to do under the language of this policy was

to do the things I have related, and put them in the mail in the way I have just related. This plaintiff has the burden of proving that that was done by a preponderance of the evidence, which means a greater weight of the evidence.

Now, there is another fact question in the case which grows out of another policy provision, that in the event of suit the insured must or shall cooperate with the company and upon the company's request shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits.

A judgment was taken by Mr. Wells here for his client against Pedro, a default judgment, on July 30, 1954. The company, so it contends, not having received the suit papers and not having any notice that the suit had been brought, says it didn't have the opportunity to defend the case and thereby was prejudiced.

That judgment was taken on July 30, 1954. On September 1, 1954—that would be just a little more [61] than a month afterward—the company learned that the judgment had been taken against Pedro by information I think given by Mr. Wells to one of the company's representatives. There is a letter in the file, which you will have among the exhibits, written by the company's representative here, or one of its representatives, dated two days later, September 3rd, is my recollection, addressed to Pedro at an address here in Portland, asking him to get in touch immediately with the company about

this matter. And that letter was returned, as you will see on the envelope.

You may remember Pedro said he was out of work and he was going here and there trying to get work. He spoke of hoeing strawberries, I think he said, for his parents out here at Sandy. And he spoke of going out to Umatilla County to work in the bean harvest. Then he finally landed in Spokane, where he remained, I think he said, maybe as much as a year or a year and a half. In any event, he didn't get back here in Portland so that the company had contact with him until September of 1956.

Now the company's position, as I understand it on this question of cooperation is that with this judgment having been taken against Pedro on July 30th, 1954, it had a year and only a year in which to move to set aside the judgment on the ground that it had not had an opportunity to defend the case; and that Pedro moving around as he did [62] and not keeping in touch with the company so that it could get him back here and enlist his cooperation in moving to set aside the judgment was in violation of the cooperation clause.

You see the spread in dates. The judgment was on July 30, 1954. He didn't get back here or, at least, the company didn't get in touch with him until nearly two years later, much longer than the year that the company had to move against the judgment.

I have some trouble in stating what I regard as the duty of the parties under that cooperation

clause. Pedro had been sued and, according to his story, he had mailed the papers in promptly to the company. Then he had to make a living, which he was having a hard time doing. He did the best he could. I think there are a number of factors you have to consider as to whether his conduct amounted to a violation of the cooperation clause. If it did amount to a violation of the cooperation clause, he can't recover in this case, even though you find he did forward the papers.

This plaintiff has two hurdles to get over. First, you must be satisfied that he forwarded the papers and, second, you must be satisfied as to this cooperation matter.

As to the cooperation matter, the defendant [63] company has the burden of proof. It has to satisfy you by a preponderance of the evidence as to that issue, that Pedro did not cooperate with it within the meaning of the policy from all the facts and circumstances here.

Now, there are quite a few facts and circumstances, it seems to me, that have a bearing on whether or not Pedro cooperated. Among the circumstances and problems, it seems to me, is his own good or bad faith. It seems to me the company's own diligence in the matter enters into it. There was some testimony here that his mother lived in the community. I don't know whether it is very clear. All those things enter into it.

I don't know that I can say anything more to you on that point. If he forwarded the letter and did not violate the cooperation clause, the plaintiff

is entitled to your verdict. If he did not forward the letter, the defendant is entitled to a verdict. Even though he forwarded the letter, if Pedro did not cooperate defendant is entitled to your verdict.

You will have two forms of verdict, one for the plaintiff and one for the defendant in the usual form. You will have the exhibits with you in the jury room. Give them the weight you think they are entitled to, along with the evidence you have heard from the witness stand.

The verdict must be unanimous. You will elect [64] a foreman who will sign your verdict after you have agreed upon it.

You have got some conflict here of fact, both direct and indirect. You are the exclusive judges of the fact questions in the case and of the weight and credibility of the witnesses. That is your function as jurors.

Any comment that I may have made here is not intended by me to indicate that I have any view that I am intending to pass on to you as to the proper solution of these fact questions.

I don't know that I used the phrase "change of address." That is the language of the policy on the front part of it. If it is true, as Counsel argued that that is one of the conditions of the policy that is one of the facts in the case, that the policy said it was important that he should keep the company advised of his change of address. Whether his failure to advise the company of a change of address under all the facts, circumstances and cond

tions amounted to failure to cooperate is for you to decide.

Swear the Bailiff.

(The Bailiff was sworn and the jury retired to consider of its verdict.)

The Court: State your objections to the instructions.

Mr. Wells: If your Honor please, I would like to take [65] one exception for the record to the Court's failure to instruct the jury, as requested in Plaintiff's Requested Instruction No. 5, to the effect that the jury should disregard the defendant's contention that Kenneth Pedro failed to keep it advised of his address for the reason that under the law and under all the evidence and circumstances of this case such failure would not relieve the defendant from liability.

The Court: You may have your exception. Exceptions for the defense?

Mr. Vergeer: I don't think we have any exceptions, your Honor. We are satisfied.

The Court: The exception stated by Mr. Wells has been duly considered and respectfully denied.

(Whereupon proceedings in the above cause were concluded.) [66]

[Endorsed]: Filed May 15, 1957.

[Endorsed]: No. 15553. United States Court of Appeals for the Ninth Circuit. Farmers' Mutual Insurance Co., Appellant, vs. John L. Roe, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: May 9, 1957.

Reporter's Transcript Filed: May 16, 1957.

Docketed: May 16, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15553

FARMERS' MUTUAL INSURANCE CO.,
Appellant.

vs.

JOHN L. ROE,
Appellee,

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now the above named Appellant, and
whereby designates to be included in the record to
be printed in this appeal the following matters:

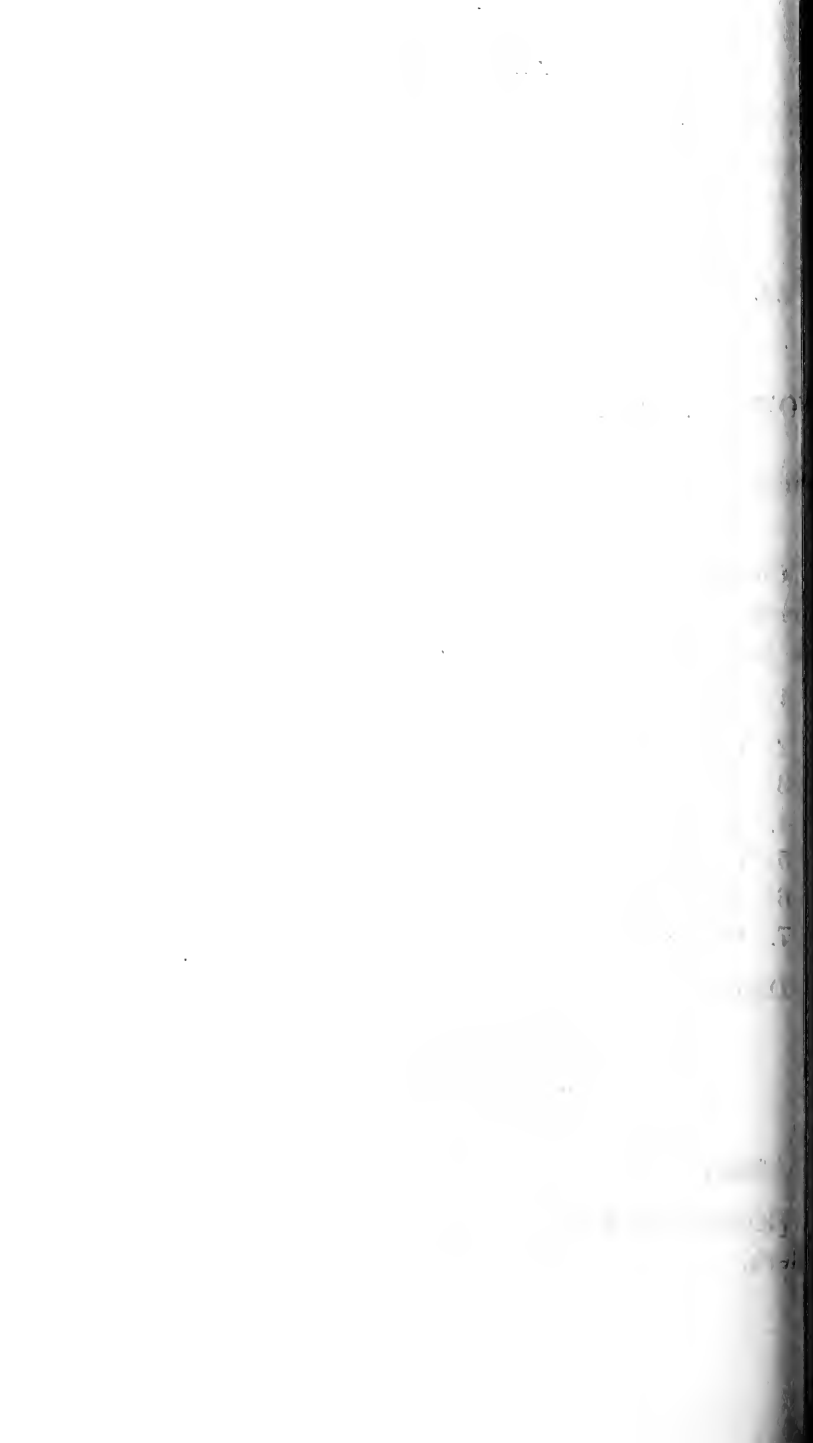
1. Pre-trial order.
2. Complete Transcript of Testimony.
3. All Exhibits.
4. Verdict.
5. Complaint.
6. Judgment.
7. Order Denying Judgment & N.O.V.

Dated this 17th day of July, 1957.

VERGEER & SAMUELS,
/s/ By C. S. CROOKHAM,
Of Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 19, 1957. Paul P. O'Brien,
Clerk.



No. 15554

United States
Court of Appeals
for the Ninth Circuit

SAM SNYDER,

Appellant,

vs.

ROBERT A. RIDDELL, District Director, Internal Revenue,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JUL 29 1957

PAUL P. O'BRIEN, C

No. 15554

**United States
Court of Appeals**
for the Ninth Circuit

SAM SNYDER,

Appellant,

vs.

ROBERT A. RIDDELL, District Director, Internal Revenue,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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EDWARD R. McHALE,
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Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant U. S. Attorney,
808 Federal Building,
Los Angeles 12, California.



The United States District Court, Southern District
of California, Central Division

No. 20551-T

SAM SNYDER,

Plaintiff,

vs.

ROBERT A. RIDDELL, District Director of In-
ternal Revenue,

Defendant.

SUIT FOR REFUND OF FEDERAL
INCOME TAXES

Plaintiff brings this suit under Judicial Code as amended, 28 U.S.C., Section 1340, for refund of federal income taxes plus interest paid thereon together with interest on the amount paid as allowed by law and alleges as follows:

1. On or before March 15, 1946, plaintiff filed his individual federal income tax return for the year 1945 with the Collector of Internal Revenue for the Sixth District of California and paid taxes shown thereon in the amount of \$4,300.69.

2. On March 23, 1948, plaintiff was assessed a deficiency in income tax for the year 1945 in the amount of \$11,803.51 plus interest in the sum of \$1,363.22, or a total of \$13,166.73, the said interest being computed to February 18, 1948.

3. Prior to 1955 plaintiff made payments on said deficiency assessment as follows: September 15,

1949, \$1,047.12; October 21, 1949, \$1,000.00; November 25, 1949, \$1,000.00; [2*] December 25, 1949, \$1,000.00; January 25, 1950, \$1,000.00; February 4, 1953, \$700.47.

4. On December 6, 1955, plaintiff paid the balance of \$7,419.14 of said assessment plus interest from March 15, 1948, to December 6, 1955, in the amount of \$4,161.21, or a total of \$11,580.35, the said amount being collected by defendant out of a judgment due plaintiff for refund of income taxes for the years 1943, 1944 and 1946.

5. In arriving at the said deficiency assessment the Commissioner of Internal Revenue computed the net income of plaintiff as \$30,860.31, exclusive of net long-term capital gain of \$3,500.00. In arriving at said amount of net income the Commissioner included in plaintiff's gross income \$31,360.31 as income from a partnership known as California Car Company. Plaintiff had one exemption of \$500.00.

6. The net income of the said partnership for 1945 was \$48,916.72. The Commissioner treated three-fourths of that amount, or \$36,687.54, as the distributive share of plaintiff and his wife and allocated therefrom to the plaintiff \$31,360.31 and to his wife \$5,327.23. Said allocation gave effect to the community property character of their income to the date of termination thereof by property settlement agreement, April 16, 1945.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

7. One-third of the said amount of \$36,687.54, or \$12,229.19, being one-fourth of the total partnership income of \$48,916.72, had been reported by plaintiff's daughter, Geraldine Snyder Weinrich, as her income, on her own income tax return.

8. The said amount of \$12,229.18 was correctly the income of the said Geraldine Snyder Weinrich and was not income of plaintiff and his wife. (See *Snyder v. Westover*, C.A. 9, 217 F. (2d) 928, determining that such share was includable in said daughter's gross income and that no part was includable in plaintiff's gross income.) One-third of the said amount of [3] \$31,360.31, or \$10,453.44, was therefore erroneously included by the Commissioner in the gross income of plaintiff.

9. Correcting plaintiff's net income for said error, his total tax liability for the year 1945 was \$9,557.85, or \$5,257.16 more than the amount paid by plaintiff on his return. Interest on said amount of \$5,257.16 to February 18, 1948, the date to which interest was computed under said deficiency assessment, is \$581.19, making the total correct deficiency to said date \$5,838.35. It results that the said deficiency assessment of \$13,166.73 was excessive to the extent of \$7,328.38.

10. The correct amount of the unpaid assessment for 1945 as of December 6, 1955, was, therefore, instead of \$7,419.14 plus interest of \$4,161.21, as follows: Deficiency, \$5,838.35; payments to date, \$5,747.59; balance of deficiency, \$90.76; interest as

follows: On \$5,838.35 from March 23, 1948, to September 15, 1949; on \$4,791.23 from September 15, 1949, to October 21, 1949; on \$3,791.23, from October 21, 1949, to November 25, 1949; on \$2,791.23, from November 25, 1949, to December 25, 1949; on \$1,791.23, from December 25, 1949, to January 25, 1950; on \$791.23, from January 25, 1950, to February 4, 1953; on \$90.76, from February 4, 1953, to December 6, 1955, or a total of interest in the amount of \$774.49, so as to make the total of tax and interest still due on December 6, 1955, \$865.25.

11. By collecting, instead of said amount of \$865.25, the sum of \$11,580.35 on said date, December 6, 1955, out of the refunds due plaintiff for other years, defendants collected \$10,715.10 too much.

12. On March 26, 1956, plaintiff filed claim for refund for the said amount of \$10,715.10, together with interest thereon as allowed by law.

13. The ground of said claim for refund is stated therein as follows: [4]

“Ground of this claim is that the determination of said deficiency is erroneous in that it resulted from the erroneous inclusion in claimant’s gross income of the share of his daughter, Geraldine Snyder Weinrich, in the income of a partnership, California Car Company. See *Snyder v. Westover*, C.A. 9 217 Fed. 2d 928, determining that said share was includable in said daughter’s gross income and not in his.”

14. No action has been taken by the Commissioner of Internal Revenue or by defendant on said claim for refund.

Wherefore, plaintiff prays for judgment in his favor as follows: Refund of \$10,715.10 plus interest thereon as allowed by law, together with his costs and disbursements in this action.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

[Endorsed]: Filed October 2, 1956. [5]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Robert A. Riddell, District Director of Internal Revenue, and for answer to the complaint admits, alleges and denies as follows:

Defendant denies the allegations contained in the preliminary unnumbered paragraph of the complaint.

1.

Defendant admits the allegations contained in paragraph numbered 1 of the complaint.

2.

Defendant admits the allegations contained in paragraph numbered 2 of the complaint.

3.

Defendant admits the allegations contained in paragraph numbered 3 of the complaint. [6]

4.

Defendant admits the allegations contained in paragraph numbered 4 of the complaint.

5.

Defendant admits the allegations contained in paragraph numbered 5 of the complaint.

6.

Defendant admits the allegations contained in paragraph numbered 6 of the complaint.

7.

Defendant admits the allegations contained in paragraph numbered 7 of the complaint.

8.

Defendant denies the allegations contained in paragraph numbered 8 of the complaint.

9.

Defendant denies the allegations contained in paragraph numbered 9 of the complaint.

10.

Defendant denies the allegations contained in paragraph numbered 10 of the complaint.

11.

Defendant denies the allegations contained in paragraph numbered 11 of the complaint.

12.

Defendant admits that plaintiff filed a claim for refund as alleged in paragraph numbered 12 of the complaint. Except as specifically admitted in this answer defendant denies each and every allegation and statement contained in said claim for refund.

13.

Defendant admits that the claim for refund contained a statement of grounds therefor as alleged in paragraph numbered 13 [7] of the complaint. Except as specifically admitted in this answer defendant denies each and every allegation or statement of grounds set forth in said claim for refund.

14.

Defendant admits the allegations contained in paragraph numbered 14 of the complaint.

Second Defense

15.

For a Separate, Alternative and Affirmative Defense of Res Judicata, defendant alleges that the issues herein have previously been litigated between the same parties hereto for the same year, 1945; that said litigation, *Sam Snyder v. Robert A. Riddell*, S. D. Cal., Civil No. 13523-Y, a suit for refund of income taxes paid for the year 1945, resulted in a final decision and judgment for the same defendant, Robert R. Riddell, entered in this court July 22, 1952, from which no appeal was taken; that the plaintiff is barred from relitigating his tax liability

for the year 1945 and estopped by judgment from maintaining this action.

Wherefore, defendant prays that this action be dismissed with costs to the defendant.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant United States At-
torney;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 19, 1956. [8]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT

To the Defendant, Robert A. Riddell, and to Laugh-
lin E. Waters, United States Attorney; Ed-
ward R. McHale, Assistant United States At-
torney; Robert H. Wyshak, Assistant United
States Attorney, His Attorneys:

You and Each of You Will Please Take Notice
that the plaintiff will bring the within motion or

for hearing before this Court in Courtroom 7, before the Honorable Leon R. Yankwich, United States District Judge, United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 11th day of March, 1957, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard.

Plaintiff moves the Court as follows:

For summary judgment herein on the basis of res judicata and collateral estoppel. [10]

For that purpose plaintiff attaches hereto the following:

- (1) Requested findings of fact.
- (2) Affidavit in support of requested findings of fact.
- (3) Requested conclusions of law.
- (4) Judgment and certificate of probable cause.
- (5) Memorandum of points and authorities.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff. [11]

[Title of District Court and Cause.]

REQUESTED FINDINGS OF FACT

1. On or before March 15, 1946, plaintiff filed his individual federal income tax return for the year 1945 with the Collector of Internal Revenue

for the Sixth District of California and paid taxes shown thereon in the amount of \$4,300.69. [Complaint herein, par. 1, admitted by answer.]

2. On March 23, 1948, plaintiff was assessed a deficiency in income tax for the year 1945 in the amount of \$11,803.51 plus interest in the sum of \$1,363.22, or a total of \$13,166.73, the said interest being computed to February 18, 1948. [Complaint herein, par. 2, admitted by answer.]

3. Plaintiff paid said deficiency assessment as follows:

Dated	Amount
September 15, 1949.....	\$ 1,047.12
October 21, 1949.....	1,000.00
November 25, 1949.....	1,000.00
December 25, 1949.....	1,000.00
January 25, 1950.....	1,000.00
February 4, 1953.....	700.47
December 6, 1955.....	7,419.14
Total	\$13,166.73

On December 6, 1955, plaintiff also paid interest on said amounts from March 15, 1948, to the dates of payment, the said interest so paid being the sum of \$4,161.21. [Complaint herein, pars. 3 and 4, admitted by answer.] The said payments made September 15 and October 21, 1949, were made to Harry C. Westover, as Collector of Internal Revenue for the Sixth District of California. The remaining payments were made to defendant as Collector or District Director of Internal Revenue for the Sixth

District of California. [Findings, par XIX, Docket 13521-Y.]

4. In arriving at the said deficiency assessment the Commissioner of Internal Revenue computed the net income of plaintiff as \$30,860.31, exclusive of net long-term capital gain of \$3,500.00. In arriving at said amount of net income the Commissioner included in plaintiff's gross income \$31,360.31 as income from a partnership known as California Car Company. Plaintiff had one exemption of \$500.00. [Complaint herein, par 5, admitted by answer.]

5. The net income of the said partnership for 1945 was \$48,916.72. The Commissioner treated three-fourths of that amount, or \$36,687.54, as the distributive share of plaintiff and his wife and allocated therefrom to the plaintiff \$31,360.31 and to his wife \$5,327.23. Said allocation gave effect to the community property character of their income to the date of termination thereof by property settlement agreement, April 16, 1945. [Complaint herein, par. 6, admitted by answer.]

6. One-third of the said amount of \$36,687.54, or [13] \$12,229.18, being one-fourth of the total partnership income of \$48,916.72, had been reported by plaintiff's daughter, Geraldine Snyder Weinrich, as her income, on her own income tax return. [Complaint herein, par 7, admitted by answer.]

7. Of the said sum of \$12,229.18 reported by plaintiff's daughter, Geraldine Snyder Weinrich, as

her own income on her own income tax return, the sum of \$10,453.44 (being one-third of the sum of \$31,360.31 referred to in finding 5 above) was treated by the Commissioner as the income of plaintiff and the balance of said amount of \$12,229.18 (being one-half of 106/365 thereof), as the income of plaintiff's wife. [Findings, par XVIII, Docket 13521-Y.]

8. If such treatment by the Commissioner of the said amount of \$10,453.44 as income of plaintiff was erroneous then plaintiff's total tax liability for the year 1945 was \$9,557.85, and the deficiency assessment in the amount of \$11,803.51 for tax and \$1,363.22 for interest shown in finding 2 should instead have been \$5,257.16 for tax and \$604.57 for interest, so that the total assessment on March 23, 1948, should have been \$5,861.73 instead of the sum of \$13,166.73. [See computation by Internal Revenue Service attached hereto as Exhibit A.]

9. On March 13, 1950, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California claims for refund of income tax covering the years 1943, 1944, 1945 and 1946. [Findings, par. XX, Docket 13521-Y.]

10. The grounds set forth in the claim for 1945 were as follows:

“The deficiency assessment results from addition to claimant's gross income by the Revenue Agent of an amount of \$18,934.89 as additional income from a partnership, California Car Company. The

aid amount, however, was not income of this claimant, but the income of his daughter, Geraldine Snyder Weinrich. [14]

“The agent also included in claimant’s gross income an amount of \$1,750 as gain resulting from the sale of property. This also is erroneous. The Revenue Agent failed to adjust the basis of the property to reflect the cost of the one-half acquired under a property settlement agreement.” [Complaint, Docket 13521-Y, Second Cause of Action, par. 15, admitted by answer therein.]

11. The claims for 1943, 1944 and 1946 also alleged the same error of inclusion in plaintiff’s income of additional income from said partnership which plaintiff contended was the income of his daughter, Geraldine Snyder Weinrich. [Complaint, Docket 13521-Y, Second Cause of Action, pars. 10, 12, 17, admitted by answer therein.]

12. All of the said claims were disallowed on September 21, 1951, under the provisions of Sec. 3772(a)(2) of the Internal Revenue Code of 1939. [Complaint, Docket 13521-Y, Second Cause of Action, par. 18, admitted by answer therein.]

13. Thereafter, on September 27, 1951, plaintiff filed suit for refund against Harry C. Westover in this Court, Docket No. 13521-Y, for refund of all payments made on deficiency assessments for the years 1943, 1944, 1945 and 1946, except for the three payments of \$1,000.00 each made to his successor in office, defendant herein, on November 25, 1949; De-

ember 25, 1949, and January 25, 1950, referred to in finding 3 above. The said suit against Harry C. Westover claimed refund of the payments made for the year 1945 on September 15, 1949, and October 21, 1949, in the sums of \$1,047.12 and \$1,000.00, respectively. On the same date a suit was filed against his successor in office, defendant herein, as Docket No. 13523-Y, for the said three payments of \$1,000.00 each made on November 25, 1949; December 25, 1949, and January 25, 1950. [Complaints Dockets 13521-Y and 13523-Y.]

14. The said two suits, together with a corresponding action brought by plaintiff's ex-wife Becky Snyder, were [15] consolidated for trial [Dockets 13521-Y, 13522-Y, 13523-Y.]

15. On June 13, 1952, plaintiff filed a trial brief. In said brief, plaintiff conceded that with respect to any period after April 16, 1945, the income involved was not community property. [Said brief, p. 6, lines 18-20.] In his opening statement at the trial plaintiff's attorney also struck the issue of gain resulting from the sale of property. [Transcript of Proceeding, p. 11.] At the trial there remained as to this plaintiff for the year 1945 only the question whether the said sum of \$10,453.44, referred to in finding 7 above, was includable in the gross income of the said Geraldine Snyder Weirich or in the gross income of plaintiff. [Findings, par. XX, Docket 13521-Y.]

16. On June 23, 1952, this Court ordered judgment for plaintiff in both of said proceedings, that

is, in *Sam Snyder v. Harry C. Westover*, Docket No. 13521-Y, and in *Sam Snyder v. Robert A. Riddell*, Docket No. 13523-Y. This court ruled against plaintiff on the issue whether the income reported by the said Geraldine Snyder Weinrich as derived from the partnership, California Car Company, was includable in her gross income or in the gross income of plaintiff, holding that the said income was includable in the gross income of plaintiff, but ruled in favor of plaintiff on all other issues preserved at the trial. Thereafter, on July 2, 1952, plaintiff filed a motion to correct the order for judgment and order thereon in the said Docket No. 13523-Y so as to show judgment for defendant instead of judgment for plaintiff. Thereupon, defendant filed in said docket proposed findings of fact and conclusions of law, and on July 17, 1952, plaintiff filed objections thereto reading as follows:

“The findings of fact and conclusions of law proposed by defendant herein are erroneous in that in this docket the issue of the family partnership was moot, and judgment is properly entered on the basis of the admissions of the [16] plaintiff now contained in the record.

“This docket involved only three tax payments of \$1,000 each, in respect to the year 1945. In relation to that year, plaintiff conceded in his trial brief, that his return for 1945 was in error in that the income after April 16, 1945, was not community income. Making that correction alone, judgment in this docket would have been in favor of defendant.

A recomputation of tax based on the assumption that the family partnership issue was decided in favor of the plaintiff is attached hereto, showing that even in the event of such a decision, no refund was due the plaintiff in this docket. It follows that, as to this docket, the family partnership issue was moot.

“Plaintiff submits that the defendant’s proposed findings of fact, conclusions of law and judgment should be disregarded and judgment entered for defendant on the basis of plaintiff’s admissions of error referred to above.”

[Record, Dockets 13521-Y and 13523-Y.]

17. Whether the said income of \$10,453.44 from the partnership, California Car Company, was includable in the gross income of Geraldine Snyder Weinrich or in the gross income of plaintiff, there was, based upon the record otherwise in said proceeding, Docket No. 13523-Y, no overpayment of tax by plaintiff at the opening of trial, nor until December 6, 1955. [See computation by Internal Revenue Service attached hereto as Exhibit A.]

18. This court signed the findings as proposed and on July 22, 1952, judgment was entered for defendant in the said Docket 13523-Y as follows: “That the Defendant have judgment against the Plaintiff for the dismissal of the action and for Defendant’s costs taxed in the sum of \$30.50.” [Record, Docket 13523-Y.] [17]

19. On September 8, 1952, defendant filed notice of appeal in the said proceeding of Sam Snyder v

Harry C. Westover, Docket No. 13521-Y. On September 10, 1952, plaintiff filed notice of cross-appeal in the said proceeding. Thereafter defendant withdrew his appeal but plaintiff perfected his appeal. [Record, Docket 13521-Y.] No appeal was taken from the judgment, as entered, in Docket No. 13523-Y. [Record, Docket 13523-Y.]

20. The findings in the proceeding appealed, that is, Docket No. 13521-Y, covered all four years, 1943 to 1946, inclusive. [See said findings.] In the opinion of the Court of Appeals, reported at 217 F. 2d 928, the statement of facts based upon the findings was in part as follows:

“In January, 1943, Geraldine, the daughter, came to Los Angeles and worked full time for the partnership, but after a few weeks, because of the rough and uncouth character of the salesmen, she worked only in the business in the evenings while her father was present, and by day in a department store. The business stayed open until 10:00 o'clock each night, and she performed during the evening many of the same duties that Wallace performed during the day. Appellant-taxpayer could only sign his name and read large, simple print, while Geraldine, on the other hand, was trained in commercial and office practice and had held responsible positions. Her work at the place of business during the evenings consisted of doing the office work, and she explained the monthly auditor's reports to her father and discussed with him such questions as the level of operating expenses, including commissions, the size of

the inventory, the reduction of financing, etc. She continued to perform the services mentioned until her retirement from the business some time after the close of World War II. [18]

“In June, 1944, Geraldine invested in the business as a partner, \$1,320.00, and in February, 1945, an additional \$700.00. These monies were derived from her salary earnings in Denver and Los Angeles. She made no withdrawals from the business during that period. She reported her one-fourth share of the partnership income on returns filed by her and paid the taxes thereon.

“In February, 1943, Geraldine married a man who was in the Navy during the entire war period. Since her husband was not stationed in Los Angeles after the marriage Geraldine remained and continued her active participation in the business until her husband and brother were discharged some time after the close of the War. At this time her husband and brother entered into business full time, and Geraldine retired to raise a family.

“On April 16, 1945, appellant-taxpayer's wife divorced him and it is concluded that the income derived from the partnership business up until the date of the divorce was the community property of himself and his wife.

“The issue of this case arises from the fact that the commissioner refused to recognize Geraldine as a partner and included her share of the partnership earnings in the income of plaintiff-taxpayer

for the years 1942, 1943, part of 1945, and 1946, and in the income of taxpayer and his wife for 1944, and part of 1945.”

21. The Court of Appeals reversed the judgment of this court in that proceeding. The mandate of the said court was filed in this court on January 24, 1955. The said court held that Geraldine's one-fourth share of the income of the partnership, California Car Company, was includable in her gross income and not in the gross income of plaintiff. No petition for certiorari was [19] filed by the government in the said proceeding. [Record in that proceeding, Docket No. 13521-Y.]

22. Thereafter, on March 29, 1955, the judgment of this court in that proceeding was entered, as revised to conform to the opinion of the Court of Appeals. Under said judgment, as so revised, refunds were ordered for all years except 1945. [Record in Docket 13521-Y.] For 1945, the tax assessed had not yet been paid in full. [Complaint herein, pars. 3 and 4, admitted by answer.] At the time of the entry of judgment as so revised in Docket 13521-Y, and excluding the said amount of \$10,453.44 referred to in finding 7 from the gross income of plaintiff, there was still no overpayment for 1945 on the basis of the record in either Docket 13521-Y or Docket 13523-Y. [See computation by Internal Revenue Service attached hereto as Exhibit A.]

23. Pursuant to the judgment as so revised the United States made refunds to plaintiff for the years 1943, 1944 and 1946 and out of the refunds

due collected, on December 6, 1955, the remaining unpaid assessment for 1945 in the amount of \$7,419.14 together with interest in the amount of \$4,161.21 from March 15, 1948, to the dates of collection, or a total of \$11,580.35. [Complaint herein, par. 4, admitted by answer.]

24. On March 26, 1956, plaintiff filed a claim for a refund of \$10,715.10 out of the said amount of \$11,580.35, together with interest as allowed by law from December 6, 1955. [Complaint herein, par. 12, admitted by answer.] The ground of said claim was stated therein as follows:

“Ground of this claim is that the determination of said deficiency is erroneous in that it resulted from the erroneous inclusion in claimant’s gross income of the share of his daughter, Geraldine Snyder Weinrich, in the income of a partnership, California Car Company. See *Snyder v. Westover*, C.A. 9, 217 Fed. 2d 928, determining [20] that said share was includable in said daughter’s gross income and not in his.”

[Complaint herein, par. 13, admitted by answer.]

The parties now agree that if plaintiff’s position is correct the amount of such refund should be \$10,650.12, plus interest thereon as allowed by law from December 6, 1955.

25. No action has been taken by defendant or by the Commissioner of Internal Revenue on the said claim for refund. [Complaint herein, par. 14, admitted by answer.] [21]

Lane Snyder - 1955

Computation of Occupancy & Credits

Debit	Credit	Ref.	Refining Balance	Debit Date	Credit Date	Credit Amount
		Self	54716			
		Sub. 2/1/55	60457			
			586173	7/19/49	9/14/49	58626 04
9,149	100772		481461	9/14/49	10/26/49	3610 00
2,569	100000		381461	10/26/49	11/28/49	1907 06
11,469	100000		281461	11/28/49	12/23/49	1507 06
7,369	100000		181461	12/23/49	1/23/50	907 05
1,150	100000		81461	1/23/50	2/4/50	10867 96
1,153	70047		11214	2/4/50	12/6/50	314570
1,155	100035		-0-			
Total Debits due - Principal					586173	
Interest					81459	
Total -					667782	
Total paid & credits					1737794	
Amount of Occupant & Credit.					1065017	
Amount claimed per Snyder					1071510	
Difference					6009	

due collected, on December 6, 1955, the remaining unpaid assessment for 1945 in the amount of \$7,419.14 together with interest in the amount of \$4,161.21 from March 15, 1948, to the dates of collection, or a total of \$11,580.35. [Complaint herein, par. 4, admitted by answer.]

24. On March 26, 1956, plaintiff filed a claim for a refund of \$10,715.10 out of the said amount of \$11,580.35, together with interest as allowed by law from December 6, 1955. [Complaint herein, par. 12, admitted by answer.] The ground of said claim was stated therein as follows:

“Ground of this claim is that the determination of said deficiency is erroneous in that it resulted from the erroneous inclusion in claimant’s gross income of the share of his daughter, Geraldine Snyder Weinrich, in the income of a partnership, California Car Company. See *Snyder v. Westover*, C.A. 9, 217 Fed. 2d 928, determining [20] that said share was includable in said daughter’s gross income and not in his.”

[Complaint herein, par. 13, admitted by answer.]

The parties now agree that if plaintiff’s position is correct the amount of such refund should be \$10,650.12, plus interest thereon as allowed by law from December 6, 1955.

25. No action has been taken by defendant or by the Commissioner of Internal Revenue on the said claim for refund. [Complaint herein, par. 14 admitted by answer.] [21]

Lane Snyder - 1945

Computation of Overpayment & Interest

To	Credit	Ref.	Debit	Date	Date	Credit
			545716			
			60457			
			586173	7/14/49	9/14/49	586173
10/49	100000		481461	9/14/49	10/14/49	3670 00
10/49	100000		381461	10/14/49	11/14/49	1000 00
10/49	100000		281461	11/14/49	12/14/49	1000 00
10/49	100000		181461	12/14/49	1/14/50	907 05
10/49	100000		81461	1/14/50	2/14/50	1000 00
10/49	100000		11214	2/14/50	3/14/50	3000 00
10/49	100000		-0-			
Total Debits due - Principal					586173	
Interest					81461	
Total -					667634	
Total paid & credited					173794	
Amount of Overpayment & Credit.					1065014	
Amount claimed for Snyder					1071510	
Difference					6498	

Same Snyder. 1945.

Contribution of Partnership Share of Same

Partnership Income Calculated. 1945

With 1 partner -	Same Snyder	50%	24458.36
	Bernard Snyder	25%	12229.18
	Donald Snyder	25%	12229.18
Total With -			48916.72

Same Snyder Community Allocation.

Total Paid		24458.36
Community	$106/345 \times 24458.36$	71079.8
Separate	$257/345 \times 24458.36$	17355.38

	Total	Same	Bushy
Community	71079.8	35514.9	35514.9
Separate	17355.38	17355.38	
	24458.36	20906.77	35514.9

Partnership Income for RAR.

Partnership Income per Return

expense

31360.81

70906.87

102544.68

Lane Snyder. 1945

Pactmship Income -	20906.87
Capital Gain	3500.00
Adj. Gross Income -	24406.87
Standard Deduction - Standard	5000.00
Net Income -	19906.87
Personal Exemptions	5000.00
Income Subject to Normal Tax -	14906.87
Normal Tax @ 3% -	702.21
Surtax on 19906.87	2106.25
Total Normal Tax Surplus	9917.70
<u>Alternative Tax.</u>	
Net Income	19906.87
Less Capital Gain	3500.00
Adjusted Net Income	16406.87
Less Personal Exemptions	5000.00
Excess Net Income Subject to Normal Tax -	11406.87
Normal Tax @ 3% -	592.21
Surplus on 11406.87	7106.25
Net Tax	7078.51
3% of Long Term Capital Gain -	1750.00
Alternative Tax	9575.56
Alternative Tax per Return	2300.69
Difference -	5257.16
Refund per Altman	5257.16



[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF
REQUESTED FINDINGS

State of California,
County of Los Angeles—ss.

George T. Altman, being first duly sworn, deposes and says:

1. That he is attorney for plaintiff in the above-entitled action.
2. That all of the requested findings supporting the motion for summary judgment filed on February 15, 1957, were prepared by him.
3. That the said requested findings accurately reflect the sources indicated therein.
4. That the computation attached to the said requested findings as Exhibit A was prepared by the Internal Revenue Service, [24] was furnished to affiant by counsel for defendant, and correctly and accurately reflects the factors shown therein.

/s/ GEORGE T. ALTMAN.

Subscribed and sworn to before me this 14th day
of February, 1957.

[Seal] /s/ BEVERLY J. COYLE,
Notary Public in and for Said
County and State. [25]

[Title of District Court and Cause.]

REQUESTED CONCLUSIONS OF LAW

I.

The judgment of this Court entered March 29, 1955, in *Snyder v. Westover*, Docket No. 13521-Y is conclusive of the issues in this proceeding on the basis of res judicata and collateral estoppel.

II.

The income reported by Geraldine Snyder Weinrich for the year 1945 as her share of the income of a partnership, California Car Company, was not includable in the gross income of plaintiff for the purpose of federal income tax.

III.

Plaintiff is entitled to a refund of the sum of \$10,650.12 together with interest on said amount as allowed by law from December 6, 1955.

[Endorsed]: Filed February 15, 1957. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT

To the Plaintiff, Sam Snyder, and to George Altman, His Attorney:

You, and Each of You, Will Please Take Notice that on Monday, March 11, 1957, at 10:00 o'clock

a.m., or as soon thereafter as counsel can be heard, in Courtroom No. 7, before the Honorable Leon R. Yankwich, Chief Judge, in the Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, the defendant, Robert A. Riddell, District Director of Internal Revenue, by and through his attorneys herein mentioned, will make the following motion for summary judgment:

The defendant, Robert A. Riddell, moves the Court to enter summary judgment against the plaintiff and for the defendant, dismissing the action on the ground there is no genuine issue as to any material fact in this action and that defendant is entitled to judgment as a matter of law as appears from the pleadings, exhibits, the briefs submitted herewith, and the affidavit of Forrest P. [33] Calkins, attached hereto and made a part hereof.

Dated: February 15, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant United States Attorney, Assistant Chief,
Tax Division;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1957. [34]

[Title of District Court and Cause.]

AFFIDAVIT OF SAM SNYDER

County of Los Angeles,

State of California—ss.

Sam Snyder, being first duly sworn, deposes and says:

(1) That he was the plaintiff in *Sam Snyder v. Harry C. Westover*, Docket No. 13521-Y in the Federal District Court at Los Angeles, and that he was also the plaintiff in *Sam Snyder v. Robert A. Riddell*, Docket No. 13523-Y in the same court.

(2) That with respect to his individual income taxes for the year 1945, the reason why he made no payments after January 25, 1950, on the deficiency assessed by the Commissioner for that year in March, 1948, was that because of overpayments of tax already made on other years he had completely run out of funds and any further payments by him could only have been made at the cost of ruinous and irreparable injury to his business. [53]

(3) That the said inability to pay continued until December, 1955, when he received refunds of taxes erroneously collected from him for the years 1943, 1944 and 1946.

/s/ SAM SNYDER.

Subscribed and sworn to before me this 1st day of March, 1957.

[Seal] /s/ BEVERLY J. COYLE,
Notary Public in and for Said
County and State.

[Endorsed]: Filed March 6, 1957. [54]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO FINDINGS
AS PROPOSED BY DEFENDANT

Plaintiff objects to defendant's requested findings on the ground that they are seriously incomplete and do not state all of the essential facts. A complete statement of the essential facts is contained in the findings as requested by plaintiff in support of his motion for summary judgment.

Plaintiff submits also that under local Rule 3(d) (2) (third paragraph), no objections having been filed by defendant to plaintiff's requested findings, the findings for the purpose of this court's denial of plaintiff's motion for summary judgment should be as requested by plaintiff.

Respectfully submitted,

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 12, 1957. [56]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO BASE
ACTION ON PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON FINDINGS
AS PROPOSED BY PLAINTIFF

To the Defendant, Robert A. Riddell, and to Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney; Robert H. Wyshak, Assistant United States Attorney, His Attorneys:

You and Each of You Will Please Take Notice, that the plaintiff will bring this motion on for hearing before this Court in Courtroom 7, before the Honorable Leon R. Yankwich, United States District Judge, United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 25th day of March, 1957, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard.

Plaintiff moves the Court to base its order on plaintiff's motion for summary judgment on the findings as requested by plaintiff.

No objections were filed by defendant to the findings [58] requested by plaintiff. It follows necessarily that for the purpose of this Court's denial of plaintiff's motion for summary judgment the findings should be as requested by plaintiff.

Defendant has submitted, however, for the Court's signature a document entitled, "Order De-

nying Plaintiff's Motion for Summary Judgment'' based upon, not the findings of fact and conclusions of law filed by plaintiff, but the findings of fact and conclusions of law filed by defendant. If defendant takes issue with the findings of fact which plaintiff proposed, then no summary judgment can be granted at all.

Respectfully submitted,

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 14, 1957. [59]

[Title of District Court and Cause.]

MINUTES OF THE COURT MARCH 18, 1957

Present: Hon. Leon R. Yankwich, District Judge.

Proceedings:

Minute Order

Objections of the plaintiff to the proposed findings of fact of the defendant are overruled and the court now signs said proposed findings of fact, conclusions of law and judgment heretofore lodged on Feb. 15, 1957, and orders them filed.

The Court orders vacated the notice of hearing on March 25, 1957, of Motion of the Plaintiff to

base action on Plaintiff's Motion for Summary Judgment on Findings Proposed by Plaintiff, and orders said motion denied summarily. Attention is called to the fact that under rule 7a only the Judge of the Court may call for a hearing on the findings and objections. The Court does not deem said hearing necessary.

JOHN A. CHILDRESS,
Clerk. [62]

United States District Court for the Southern
District of California, Central Division
No. 20551-Y Civil

SAM SNYDER,

Plaintiff,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND SUMMARY JUDGMENT

The above-entitled matter having come on for hearing on the defendant's motion for summary judgment before the Honorable Leon R. Yankwich, Chief Judge; the plaintiff represented by his attorney, George Altman, and the defendant by his attorneys, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States

Attorney, Chief, Tax Division, and Robert H. Wyshak, Assistant United States Attorney, and the Court having considered the affidavits, exhibits and authorities submitted makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

On or before March 15, 1946, plaintiff filed his individual federal income tax return for the year 1945 with the Collector of Internal Revenue for the Sixth District of California and paid [65] taxes shown thereon in the amount of \$4,300.69.

II.

On March 23, 1948, there was assessed against plaintiff a deficiency in income tax for the year 1945 in the sum of \$11,803.51 plus interest in the sum of \$1,363.22 computed to February 18, 1948.

III.

Plaintiff paid said assessment as follows:

Date	Amount
September 15, 1949.....	\$ 1,047.12
October 21, 1949.....	1,000.00
November 25, 1949.....	1,000.00
December 25, 1949.....	1,000.00
January 25, 1950.....	1,000.00
February 4, 1953.....	700.47
December 6, 1955.....	7,419.14
Total	<hr/> \$13,166.73

On December 6, 1955, plaintiff also paid interest in the sum of \$4,161.21. The said payments made September 15 and October 21, 1949, were made to Harry C. Westover as Collector of Internal Revenue for the Sixth District of California. The remaining payments were made to the defendant.

IV.

In arriving at the aforementioned deficiency, the Commissioner of Internal Revenue computed the net income of the plaintiff as \$30,860.31, exclusive of net long-term capital gains of \$3,500.00. In arriving at said net income the Commissioner included in gross income \$31,360.31, as income from a partnership known as California Car Company. Plaintiff had one exemption of \$500.00.

V.

The net income of said partnership for the year 1945 was \$48,916.72. The Commissioner treated three-fourths of that amount, [66] or \$36,687.54, as the distributive share of plaintiff and his wife, and allocated therefrom to the plaintiff \$31,360.31 and to his wife \$5,327.23.

VI.

One-third of the said amount of \$36,687.54, or \$12,229.18, had been reported by plaintiff's daughter, Geraldine Snyder Weinrich, as her income on her own income tax return.

VII.

Of the said sum of \$12,229.18 reported by plaintiff's said daughter, the sum of \$10,453.44 (one-

third of the sum of \$31,360.31 referred to in finding No. V above) was treated by the Commissioner as the income of plaintiff and the balance of said amount of \$12,229.18, as the income of plaintiff's wife.

VIII.

On March 13, 1950, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California claims for refund of taxes for the years 1943, 1944, 1945 and 1946.

IX.

The grounds set forth in the claim for 1945 were in pertinent part as follows:

"The deficiency assessment results from addition to claimant's gross income by the Revenue Agent of an amount of \$18,934.89 as additional income from a partnership, California Car Company. The said amount, however, was not income of this claimant, but the income of his daughter, Geraldine Snyder Weinrich.

"The agent also included in claimant's gross income an amount of \$1,750 as gain resulting from the sale of property. This also is erroneous. The Revenue Agent failed to adjust the basis of the property to reflect the [67] cost of the one-half acquired under a property settlement agreement."

X.

The claims for 1943, 1944 and 1946 also alleged the same error of inclusion in plaintiff's income of

additional income from said partnership which plaintiff contended was the income of his daughter, Geraldine Snyder Weinrich.

XI.

All of the said claims were disallowed on September 21, 1951, under the provisions of § 3772(a) (2) of the Int. Rev. Code of 1939.

XII.

Thereafter, on September 27, 1951, plaintiff filed suit for refund against Harry C. Westover, former Collector of Internal Revenue, in this Court, Docket No. 13521-Y, for refund of all payments made of assessments for the years 1943, 1944, 1945 and 1946, except for three payments credited to his taxes for the year 1945 of \$1,000.00 each made to his successor in office, Robert A. Riddell, defendant herein, on November 25, 1949; December 25, 1949, and January 25, 1950, referred to in paragraph III hereinabove. The said suit against Harry C. Westover claimed refund of the said payments made for the year 1945 on September 15, 1949, and October 21, 1949, in the sums of \$1,047.12 and \$1,000.00, respectively. On the same date a suit was filed against his successor in office, Robert A. Riddell, defendant herein, as Docket No. 13523-Y, for the said three payments on his taxes for the year 1945 of \$1,000.00 each made on November 25, 1949; December 25, 1949, and January 25, 1950.

XIII.

The said two suits, together with a corresponding action brought by plaintiff's ex-wife, Becky Snyder, were consolidated for trial. [68]

XIV.

On June 23, 1952, this Court filed its decisions in both of said proceedings, that is, Sam Snyder v. Harry C. Westover, Docket No. 13521-Y, and Sam Snyder v. Robert A. Riddell, Docket No. 13523-Y. Thereafter, on July 2, 1952, plaintiff filed a motion to correct the order for judgment and order thereon in the said Docket No. 13523-Y so as to show judgment for defendant instead of judgment for plaintiff. Thereupon, defendant filed in said docket proposed findings of fact and conclusions of law.

This Court signed the findings as proposed and on July 22, 1952, judgment was entered for defendant in the said Docket No. 13523-Y as follows: "That the Defendant have judgment against the Plaintiff for the dismissal of the action and for Defendant's costs taxed in the sum of \$30.50."

XV.

On September 8, 1952, defendant filed notice of appeal in the said proceeding of Sam Snyder v. Harry C. Westover, Docket No. 13521-Y. On September 10, 1952, plaintiff filed notice of cross-appeal in the said proceeding. Thereafter defendant withdrew his appeal but plaintiff perfected his appeal. The opinion of the Court of Appeals for the Ninth Circuit has been reported at 217 F. 2d 928.

XVI.

No appeal was taken from the judgment in Docket No. 13523-Y, which has now become final.

XVII.

Thereafter, the judgment of this Court in Docket No. 13521-Y was revised to conform to the opinion of the Court of Appeals. Under said judgment, as so revised, refunds were ordered for the years 1943, 1944 and 1946.

XVIII.

Pursuant to the judgment as so revised the United States made refunds to plaintiff for the years 1943, 1944 and 1946 and out [69] of the refunds due collected, on December 6, 1955, the remaining unpaid assessment for 1945 in the amount of \$7,419.14 together with interest in the amount of \$4,161.21 from March 15, 1948, to the dates of collection, or a total of \$11,580.35.

XIX.

On March 26, 1956, plaintiff filed a claim with the District Director of Internal Revenue for refund of taxes and interest of \$10,715.10 for the year 1945 on the ground that "the determination of said deficiency is erroneous in that it resulted from the erroneous inclusion of claimant's gross income of the share of his daughter, Geraldine Snyder Weinrich, in the income of a partnership, California Car Company. See *Snyder v. Westover*, C.A. 9, 217 Fed. 2d 928, determining that said share was includible

in said daughter's gross income and not in his." Said claim has not been disallowed.

XX.

The grounds on which this latter claim is based are the same as the grounds for the claim filed for the year 1945 on March 13, 1950, on which the prior action, Docket No. 13523-Y, against Robert A. Riddell, defendant herein, was based and which, after trial, resulted in a final judgment for the defendant.

XXI.

The plaintiff in this action seeks to relitigate his tax liability for the year 1945.

XXII.

Every conclusion of law deemed to be a finding of fact is hereby found as a fact.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and the parties hereto.

II.

Each tax year constitutes a separate cause of action and [70] a taxpayer may not subsequently relitigate his tax liability after a final judgment against him.

U. S. v. C. C. Clark, Inc.,

159 F. 2d 489 (5th Cir.), cert. denied 331

U. S. 818 (1947);

Guettel v. U. S.,

95 F. 2d 229 (8th Cir.), cert. denied 305
U. S. 603 (1938);

Western Maryland Ry. Co. v. U. S.,

23 F. Supp. 554 (D. Md., 1938).

III.

The plaintiff is barred by *res adjudicata* from seeking a refund of income taxes and interest for the year 1945 on the ground that the family partnership of which he was a member should be recognized for tax purposes, since a final judgment in a prior action for refund of taxes for the same year on the same ground resulted in a judgment against him, from which no appeal was taken.

IV.

The plaintiff cannot collaterally attack the judgment on the merits in the prior action since the court there had jurisdiction.

V.

The defendant is entitled to judgment dismissing the complaint with prejudice together with his costs in the sum of \$.....

VI.

Every finding of fact deemed to be a conclusion of law is hereby concluded as a matter of law.

Summary Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed that the complaint be dismissed with prejudice and with costs of defendant [71] in the sum of \$20.00 to be taxed by the Clerk of the Court.

Dated: March 18, 1957.

/s/ LEON R. YANKWICH,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged February 15, 1957.

[Endorsed]: Filed March 18, 1957.

Docketed and entered March 22, 1957. [72]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiff, Sam Snyder, hereby appeals to the Court of Appeals for the Ninth Circuit from the order in the above-entitled case denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment, which order was entered on March 22, 1957.

Dated this 8th day of April, 1957.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

[Endorsed]: Filed April 8, 1957. [74]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF INTENDS TO RELY

Plaintiff submits the following statement of points on which he intends to rely in this appeal:

1. The judgment of dismissal in *Sam Snyder v. Robert A. Riddell*, Docket No. 13523-Y of this court, is not *res judicata* in this proceeding.

2. If such judgment is *res judicata* in this proceeding then it was a bar to the collection on December 6, 1955, of the tax involved in this action and said collection was for that reason erroneous and illegal.

3. The judgment in Docket No. 13521-Y of this court, as modified pursuant to mandate of the Court of Appeals for the Ninth Circuit in *Sam Snyder v. Harry C. Westover*, 217 F. 2d 928, is dispositive of the case here on the basis of collateral estoppel.

4. The District Court had no power to enter summary [76] judgment because the facts were in dispute.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1957. [77]

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

- Oct. 2—Fld complt for refund of \$10,715.10 in
Fed Income Taxes. Issd sums. Md JS-5.
- Oct. 10—Fld ord of Trans purs to Low Number
Rule transfg case to calendar of Judge
Thurmond Clarke for all fur procs. Attys
Notifd.
- Oct. 12—Fld sums retn svd.
- Dec. 4—Fld stip & ord thereon extendg time for
deft to plead to 12/19/56.
- Dec. 12—Fld Ord Trans case to calendar Judge
Leon R. Yankwich purs Rule 2 for all fur
predgs. Attys ntfd.
- Dec. 19—Fld answer.
- Dec. 20—Placed on settg calen for hrg 1/7/57, 10:00
a.m. Counsel notifd.

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- Jan. 7—Procs for settg. Ord settg off calendar.
- Feb. 15—Fld mot for sums judgt with not mot
retble 3/11/57, 10:00 a.m. & with requested
finds fact, requested concls law & proposed
judgt. Fld defts mot for sum judgt with
not mot retble 3/11/57 & lodged defts
proposed finds fact, concls law & judgt.
- Feb. 20—Fld US Mars retn on writ (mot & not of
mot for summy jgmt) Retnd svd.
- Feb. 26—Fld defts reply brief.
- Mar. 6—Fld pltfs reply brief.

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- Mar. 11—Ent procs et hrd stmt of counsel and mot pltf for summy judg denied. Mot deft for summy judgt granted. Counsel pltf 5 days to object to finds fact, concls law and judgment presented to the court by deft.
- Mar. 12—Lodged defts proposed ord denyg pltf's mot for summy judgment. Fld pltf's objecs to findings as proposed by deft.
- Mar. 14—Fld mot to base action on pltf's mot for sum judgt on finds as proposed by pltf with not mot retble 3/25/57 & memo pts & auths.
- Mar. 15—Fld defts memo in opposn to mot to base action on pltf's mot for summy judgt on finds as proposed by pltf.
- Mar. 18—Ent min ord objecs of pltf to proposed finds of deft denied; proposed finds of deft signed and ord filed; not of mot pltf to base action on pltf's mot for summy judg on finds proposed by pltf vacated and mot denied summarily. Counsel notified.
- Mar. 18—Fld ord deny plf's mot for summary judg. Ent 3/22/57 & not attys.) Fld finds fact & concl law & summary judg dismiss compl with prej & with costs fv deft. (Ent 3/22/57 & not attys.) JS6.
- Mar 26—Fld defts cost bill & fld not of entry summy judgment.
- Apr. 1—Taxed costs \$20.00 No objections.
- Apr. 8—Filed notice of appeal.

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May 1—Fld defts appellee's counter-designation contents record on appeal Fld desig of contents rec on appeal & fld state pts on wh pltf intends to reply & fld personal bond for costs on appeal secured by cash dep \$250.00. Dep cert check for \$250.00 in Regy.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 86, inclusive, containing the original:

Complaint;

Answer;

Motion & Notice of Motion for Summary Judgment;

Requested Findings of Fact;

Affidavit in Support of Requested Findings;

Requested Conclusions of Law;

Motion & Notice of Motion for Summary Judgment;

Plaintiff's Reply Brief;

Affidavit of Sam Snyder;

Plaintiff's Objections to Findings as Proposed by Defendant;

Notice of Motion and Motion to Base Action on Plaintiff's Motion for Summary Judgment on Findings as Proposed by Plaintiff;

Minutes of the Court for March 18, 1957;

Order Denying Plaintiff's Motion for Summary Judgment;

Findings of Fact, Conclusions of Law and Summary Judgment;

Notice of Appeal;

Statement of Points on Which Plaintiff Intends to Rely;

Defendant-Appellee's Counter-Designation of Contents of Record on Appeal;

Designation of Contents of Record on Appeal;

and a full, true and correct copy of the Docket Entries.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

[Seal]

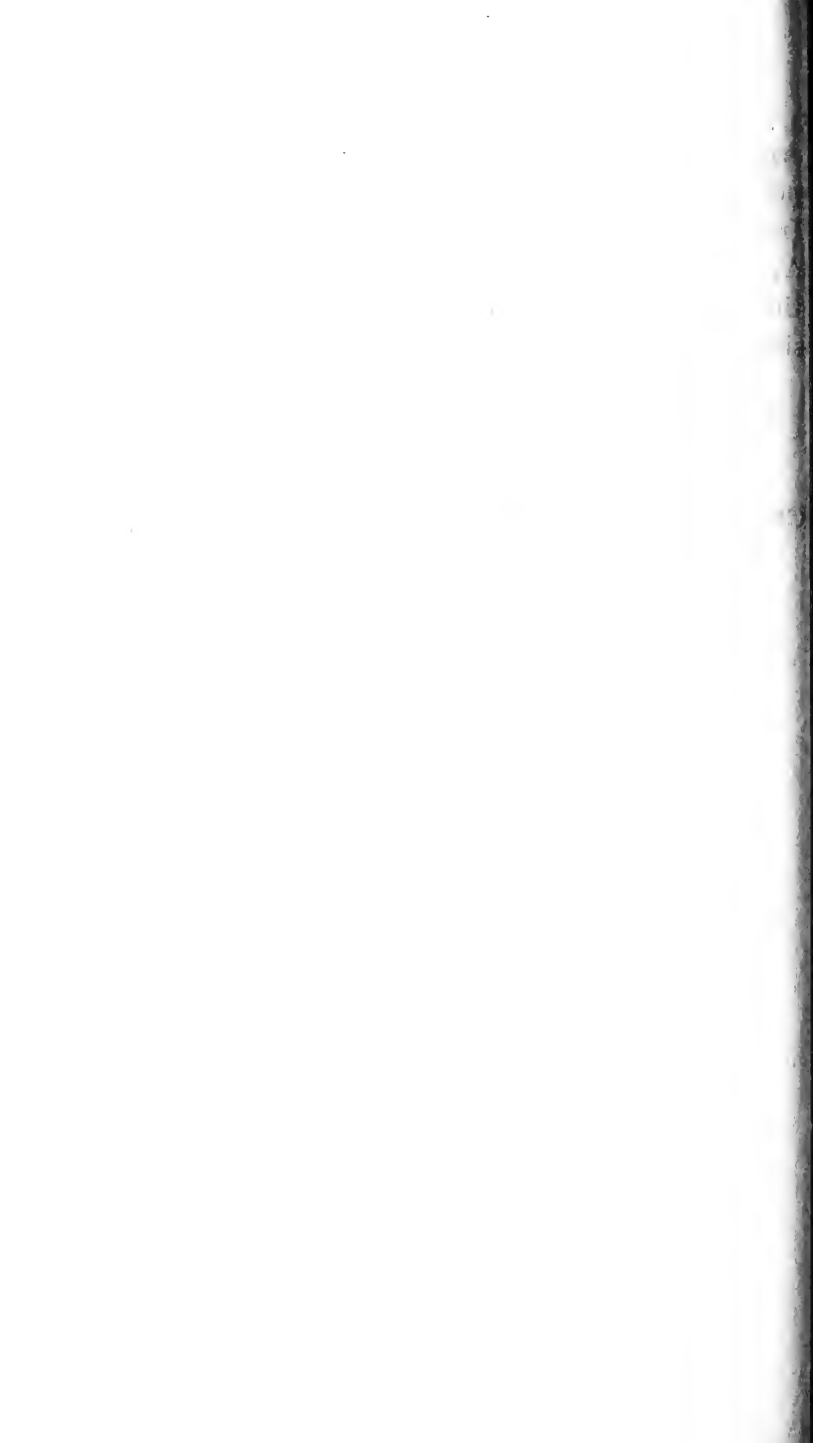
JOHN A. CHILDRESS,
Clerk;

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15554. United States Court of Appeals for the Ninth Circuit. Sam Snyder, Appellant, vs. Robert A. Riddell, District Director, Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.



No. 15,558

In the

United States Court of Appeals

For the Ninth Circuit

CLIFFORD JEFFERSON,

Appellant,

vs.

HARLEY O. TEETS, Warden of the California State Prison at San Quentin, California,

Appellee.

Appellee's Brief

Appeal from the United States District Court for the Northern District of California, Southern Division

EDMUND G. BROWN
Attorney General of California

CLARENCE A. LINN
Assistant Attorney General

WILLIAM M. BENNETT
Deputy Attorney General
600 State Building
San Francisco 2, California

Attorneys for Appellee

FILED

JUL 19 1957

PAUL P. O'BRIEN, CLERK

SUBJECT INDEX

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Appendix—Decision of the California Supreme Court, Decem- ber 4, 1956, in The People of the State of Califor- nia, Respondent, v. Clifford Jefferson, Appellant, 47 A.C. 442 [303 P.2d 1024].	

TABLE OF AUTHORITIES CITED

CASES	Pages
Brown v. Allen, 344 U.S. 443.....	11, 12
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No. 15,558

In the

United States Court of Appeals

For the Ninth Circuit

CLIFFORD JEFFERSON,

Appellant,

vs.

HARLEY O. TEETS, Warden of the California State Prison at San Quentin, California,

Appellee.

Appellee's Brief

Appeal from the United States District Court for the Northern District of California, Southern Division

STATEMENT OF THE CASE

On March 18, 1957, the appellant, CLIFFORD JEFFERSON, filed a petition for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 2). After a hearing at which oral argument was heard on behalf of the participants, Judge Louis E. Goodman denied the petition on April 16, 1957 (CT 76). Thereafter a certificate of probable cause was granted on April 26, 1957 (CT 84), and notice of appeal was filed on April 29, 1957 (CT 87).

STATEMENT OF FACTS

The petition for a writ of habeas corpus seeks to set aside a judgment of conviction under California Penal Code § 4500 imposing the death penalty.

In the petition filed in the United States District Court appellant alleged that the application of the California Penal Code § 4500 is wanting in due process and is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Appellant alleged that he was not in fact a life-term prisoner within the meaning of the California statute, and also made an attack upon the testimony of one of the witnesses as being perjured.

ARGUMENT

I. The Petition Herein Filed.

The appellant herein has filed with this Court a rather lengthy brief which when analyzed seems to reduce itself to a challenge to the constitutionality of Penal Code § 4500 upon the grounds that said section is violative of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and that appellant was not in fact serving a life term. There are other contentions set forth in the brief, none of which, however, in our opinion give rise to any federal question.

II. Penal Code Section 4500 Is Constitutional.

Originally enacted as Penal Code § 246 (Stats. 1901, page 6) Section 4500 of the California Penal Code was the subject of review with regard to its constitutionality in *People v*

Finley, 153 Cal. 59. The *Finley* case was reviewed by the United States Supreme Court in *Finley v. California*, 222 U.S. 28, and again approved. We consider both of these cases conclusive so far as any question of constitutionality is concerned under either state or federal constitutional provisions. The *Finley* case, 153 Cal. 59, gives a complete and enlightening discussion as to the need for such a statute and as to its validity:

“As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and indeed, of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers, and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by ‘life-termers,’ form a part of the history of our state. Indeed, it is known that at times the prison officials have deemed it wise to clothe the ‘life-termers’ in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well-recognized condition of affairs it seemed expedient to the legislature to meet the situation by the enactment of section 246 of the Penal Code.” (Page 61)

“* * * The ‘life-termers,’ as has been said, while within the prison walls, constitute a class by them-

selves, a class recognized as such by penologists the world over.

“* * * It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

“Nor can it be said that the act in question is violative of the fourteenth amendment of the constitution of the United States. This amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. (*Missouri v. Lewis*, 101 U.S. 22.) Paraphrasing the language of the supreme court of the United States in *Moore v. Missouri*, 159 U.S. 676, [16 Sup. Ct. 179], we cannot perceive that appellant was denied the equal protection of the laws for every other person in like cases with him and convicted as he has been would be subjected to like punishment.” (Page 62)

III. Petitioner Was Undergoing a Life Sentence at the Time He Assaulted Another Inmate.

All of the assertions of appellant have been raised and considered by the courts in other cases with a uniformly adverse effect to appellant's claims. The California Supreme Court in *People v. Jefferson*, 303 P.2d 1024 (see Appendix “A”), at 1026, had this same contention before it and disposed of it thusly:

“At the time of the assault defendant was serving a sentence for murder in the second degree, which carries a punishment of from five years to life. (Pen. Code, § 190.) The Adult Authority may fix this sentence at a lesser term than life. However, at the time of the assault here involved it had not so acted. Therefore, under the settled law of this state defendant was undergoing a ‘life sentence’ when he committed the assault. (*People v. Smith*, 36 Cal. 2d 444, 445, 222 P.2d 719; *People v. McNabb*, 3 Cal. 2d 441, 444, 45 P.2d 334;

People v. Wells, 33 Cal. 2d 330, 334, 202 P.2d 53; People v. Finley, 153 Cal. 59, 62, 94 P. 248.)”

The question of sentence and the measurement thereof was first considered by the California Supreme Court in *In re Lee*, 177 Cal. 690. The *Lee* case held constitutional the indeterminate sentence law (Stats. 1917, p. 665, effective July 27, 1917), and stated at pages 693 and 694:

“* * * It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term.

“* * * For the foregoing reasons the weight of authority is to the effect that indeterminate sentence laws do not violate constitutional provisions such as ours (article III, section 1), providing for a segregation of governmental powers into the three departments—legislative, executive, and judicial.”

There then followed other cases, all of which came to the same conclusion as the *Lee* case, but perhaps the leading case was *People v. McNabb*, 3 Cal. 2d 441. At the time of McNabb's alleged violation of the then Penal Code § 246 he was undergoing sentence for robbery in the first degree, punishment of which was “not less than five years.” Considering squarely the question of whether or not McNabb was at that time undergoing a life sentence, the court stated at page 444:

“* * * The maximum therefore is a life sentence, subject to be shortened by the action of the state board of prison terms and paroles, as provided by the provisions of section 1168 of the Penal Code. Until action is taken by said board fixing a shorter duration of imprisonment than life it is uniformly held ‘that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not

void for uncertainty.' (In re Lee, 177 Cal. 690 (171 Pac. 958), citing many supporting cases.)"

On page 456 the court continues :

"The only remaining question which merits consideration is the one most strongly stressed by appellants, to wit: were appellants 'undergoing a life sentence' at the time they committed the assaults? The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes a minimum sentence of not less than five years and with no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term. This question was definitely settled by In re Lee, 177 Cal. 690 [171 Pac. 958], in 1918 and has been the pronounced law of the state since. Every person is charged with a knowledge of its existence. The fact that section 246 of the Penal Code was adopted in 1901, at a time trial courts pronounced a fixed term of imprisonment, can in nowise affect the operation of the present rule of law as declared in In re Lee, supra."

See, also, *People v. Wells*, 33 Cal. 2d 330; *In re Cowen*, 27 Cal. 2d 637, at 648; *In re Quinn*, 25 Cal. 2d 799, at 800; *People v. Ralph*, 24 Cal. 2d 575, at 578; *People v. Jones*, 6 Cal. 2d 554, at 556.

IV. A Discussion of the Wells Case.

All of the cases heretofore cited are in our opinion most clear and complete in their holdings with reference to appellant's contentions. An almost exhaustive treatment, however, of the indeterminate sentence law and California Penal Code Section 4500 is contained in the so-called *Wells* litigation commencing with action in the State court and terminating finally in the federal courts.

By way of background Wells was convicted of having violated Section 4500 of the California Penal Code, having thrown a heavy crockery cuspidor and striking certain prison personnel with great force. Upon the automatic appeal from the sentence of death in *People v. Wells*, 33 Cal. 2d 330, the court reviewed Wells' status as a life prisoner. He at the time of throwing the cuspidor was serving time for violation of Section 4502 of the California Penal Code, the minimum term of which is five years, no maximum term being provided and none having been fixed by the Adult Authority. The court held at page 335:

“* * * Therefore, under the settled law of this state, defendant was, in effect, ‘undergoing a life sentence’ within the meaning of section 4500. (*People v. McNabb* (1935), 3 Cal. 2d 441, 456-458 [45 P.2d 334]; *People v. Williams* (1945), 27 Cal. 2d 216, 219 [163 P.2d 441].) Defendant urges that the reasoning of the McNabb case is faulty and that the problem should be reexamined and the McNabb and Williams cases should be overruled.”

Following a determination by the California Supreme Court, a habeas corpus action was commenced in *Ex parte Wells* (1950), 90 F. Supp. 855, in which the district court declined the action upon the ground that available state remedies had not been exhausted. Contained within the federal action in this same case, however, was a denial of certiorari (338 U.S. 836, 70 S.Ct. 43, 94 L.Ed. 510).

Pursuant to federal suggestion there came *In re Wells* (1950), 35 Cal. 2d 889 (221 P.2d 947), in which a writ of habeas corpus was sought and denied by the court which stated at page 892:

“The People of the State of California, through their Legislature, established the nondiscretionary

punishment of death for the offense denounced by section 4500 of the Penal Code. (See *People v. Finley* (1908), 153 Cal. 59, 62 [94 P. 248]; *Finley v. California* (1911), 222 U.S. 28, 31 [32 S.Ct. 13, 56 L.Ed. 75].) Thereafter, the People, through their Legislature, gave to the Board of Prison Terms and Paroles, which agency by later legislation has become the Adult Authority, the power and duty to determine, within statutorily defined limits, the length of time of imprisonment of felons sentenced to a state prison on judgments not imposing the death penalty. (See *In re Lee* (1918), 177 Cal. 690, 693 [171 P. 958]; *People v. Hale* (1923), 64 Cal. App. 523, 535 [222 P. 148]; *In re Northcott* (1925), 71 Cal. App. 281, 284 [235 P. 458]; *In re Collins* (1926), 198 Cal. 508, 509 [245 P. 1089]; *People v. Stratton* (1934), 136 Cal. App. 201, 207 [28 P.2d 695].) As previously indicated it is well settled that the nondiscretionary death penalty applies to a felon who, while serving an indeterminate sentence with no fixed maximum term of years, commits an assault of the sort described in section 4500. (*People v. McNabb* (1935), *supra*, pp. 456-458 of 3 Cal. 2d; see also *In re Quinn* (1945), *supra*, p. 800 of 25 Cal. 2d; *People v. Williams* (1945), *supra*, p. 219 of 27 Cal. 2d; *People v. Wells* (1949), *supra*, p. 337 of 33 Cal. 2d.) As said in *People v. McNabb* (1935), *supra*, pp. 456-457, 'The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes * * * no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term.'"

Following the denial of the request for a writ of habeas corpus in *In re Wells* (1950), 35 Cal. 2d 889, the United States Supreme Court denied certiorari (340 U.S. 937). There then followed *Ex parte Wells* (1951), 99 F. Supp. 320, in which the court states at page 323:

“Whatever may be thought of the correctness of this construction of Section 4500, it must be accepted by this court. We are bound by the State Court’s construction of the State statute. *State of Minnesota ex rel Pearson v. Probate Court*, 1940, 309 U.S. 270, 273, 60 S.Ct. 523, 84 L.Ed. 744; *Nebblett v. Carpenter*, 1938, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182; *Standard Oil Co. of Indiana v. State of Missouri*, 1912, 224 U.S. 270, 287, 32 S.Ct. 406, 56 L.Ed. 760; *West v. State of Louisiana*, 1904, 194 U.S. 258, 261, 24 S.Ct. 650, 48 L.Ed. 965; *Central Land Co. v. Laidley*, 1895, 159 U.S. 103, 112, 16 S.Ct. 80, 40 L.Ed. 91; *Iowa Central Ry. Co. v. State of Iowa*, 1896, 160 U.S. 389, 393, 16 S.Ct. 344, 40 L.Ed. 467.”

Following *Ex parte Wells* (1951), 99 F. Supp. 320, the case was considered in *Duffy v. Wells* (1952), 201 F.2d 503, by the Ninth Circuit Court of Appeals which reversed Judge Goodman’s order. The court there held at page 505:

“It has long been established in California that the legislature intended that such a sentence is fixed for life, until the California Adult Authority acting under Section 5077 of the California Penal Code shall fix a shorter term. *People v. McNabb*, 3 Cal. 2d 441, 456, 458, 45 P.2d 334; *People v. Williams*, 27 Cal. 2d 216, 219, 163 P.2d 441; and *People v. Wells*, 33 Cal. 2d 330, 335, 202 P.2d 53.

* * * * *

“The district court’s opinion ignores the fact that the California Supreme Court in the above cases has held that Section 4502 fixes the sentence at life imprisonment in the absence of the action of the Adult Authority and erroneously poses the question before it as follows:

“Does the selection, as a class, of state prisoners, *whose maximum sentence has not been administratively fixed*, for the exceptional penalty of Section

4500, violate the federal guaranty of due process and equal protection of the law?" (Emphasis supplied.)

"Here the maximum sentence of life imprisonment has been fixed not by the Adult Authority but by the legislative adoption of Section 4502, as construed by the above decisions of the California Supreme Court which are binding on the federal courts. *State of Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273, 60 S.Ct. 523, 84 L.Ed. 744; *Neblett v. Carpenter*, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182.

"The legislature, in enacting Section 4502, chose a rational classification of state criminals to whom the life sentence should apply. It is not a denial of equal protection of the law because there are other classes of state prisoners to whom it does or does not apply. Cf. *Collins v. Johnston*, 237 U.S. 502, 510, 35 S.Ct. 649, 59 L.Ed. 1071.

"Wells contends that there is an absence of due process because if the Adult Authority had not refrained from reducing the sentence so fixed from life imprisonment to a term of years, but so had acted. Penal Code Section 3022 permits it to do so without notice to him and without his participancy in propria persona or by counsel. This contention rests on the erroneous assumption that it is the law of California that the functions of the Adult Authority are judicial in character, to be performed under the due process requirements of the Fourteenth Amendment.

"The powers of the Adult Authority were formerly exercised by a State Board of Prison Directors. It is the law of California that the 'fixing of the term if imprisonment by the board [Adult Authority] is not judicial in its nature.' In *re Weintraub*, 61 Cal. App. 2d 666, 671, 143 P.2d 936, 939. The state as well may confine the power of reducing a sentence so fixed for life to the uncontrolled discretion of a nonjudicial

administrative body as it could leave to the Governor's uncontrolled discretion the exercise of his power of executive clemency."

The petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, October 19, 1953, was denied (346 U.S. 861).

V. The Case of Appellant Considered Under the Criteria of *Brown v. Allen*, 344 U.S. 443.

So far as we can determine the same arguments which are now advanced to the federal court were presented for decision to the State Supreme Court on the automatic appeal from the death penalty in *People v. Jefferson*, 47 A. C. 442 (303 P.2d 1024) (see Appendix). The claimed unconstitutionality of California Penal Code § 4500 as violative of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution was rejected. The contention that defendant was not undergoing a life sentence was rejected. The question of prejudicial error in instructions; the sufficiency of the evidence; the refusal of certain instructions; the treatment of the motion for a new trial on the basis of newly discovered evidence—all of these things were fully considered by the highest state court, and after due consideration the judgment and order of the trial court were affirmed. We do not consider that this Court has jurisdiction to grant any relief on the basis of *Brown v. Allen*, *supra*. The applicability of the Fourteenth Amendment to the United States Constitution has been rejected not only by the State court but also by the United States Supreme Court in *Finley v. California*, 222 U.S. 28. As to the question of life sentence, as stated by the court in *Duffy v. Wells*, 201 F.2d 503, at 505:

“Here the maximum sentence of life imprisonment has been fixed not by the Adult Authority but *by the legislative adoption of Section 4502*, as construed by the above decisions of the California Supreme Court which are binding on the federal courts. *State of Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273, 60 S.Ct. 523, 84 L.Ed. 744; *Neblett v. Carpenter*, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182.”

Inasmuch as this matter has been fully considered by the California Supreme Court, we consider this language in *Brown v. Allen*, 344 U.S. 443, at 465, as being decisive:

“* * * As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of postconviction remedies.”

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(Appendix Follows)





Appendix

Decision of the California Supreme Court, December 4, 1956, in *The People of the State of California, Respondent, v. Clifford Jefferson, Appellant*, 47 A.C. 442; (303 P.2d 1024):

This is an automatic appeal from a judgment of guilty of violating section 4500 of the Penal Code (assault with a deadly weapon by a prisoner undergoing a life sentence in a state prison)¹ after trial by a jury. There is also an appeal from the order denying defendant's motion for a new trial.

On September 13, 1955, defendant, an inmate of Folsom State Prison undergoing a life sentence, assaulted with a deadly weapon another prisoner, Leonard Thompson.

QUESTIONS

First: Did the trial court err in denying defendant's motion to set aside the indictment?

No. Section 995 of the Penal Code provides two grounds for setting aside an indictment: "1. Where it is not found, endorsed, and presented as prescribed in this code. 2. That the defendant has been indicted without reasonable or probable cause."

Defendant contends that the trial court erred in failing to grant his motion to set aside the indictment because the foreman of the grand jury did not comply with the provisions of section 907 of the Penal Code.²

1. Section 4500 of the Penal Code reads: "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, is punishable with death."

2. Section 907 of the Penal Code reads: "Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be

Section 995, subdivision 1, of the Penal Code has been interpreted as applying only to those sections in part 2, title 5, chapter 1, of the Penal Code beginning with section 940. (*People v. Colby*, 54 Cal. 37; *People v. Kempley*, 205 Cal. 441, 447 (271 P. 478).)

In *People v. Kempley*, *supra*, this court held an indictment was not subject to attack under the provisions of section 995 of the Penal Code because of noncompliance with the requirements of section 907 of the Penal Code. It said at page 447: "The provisions of the foregoing section were not complied with; but the neglect or failure of the foreman to comply therewith is not made a ground for setting aside the indictment by section 995 of the Penal Code and section 907 contains within itself the penalty for the violation of its provisions."

This rule is applicable to the facts of the present case.

The record before the grand jury disclosed that Thompson was waylaid by three men, two of whom had knives. Defendant was one of the men who had a knife, and he inflicted knife wounds upon Thompson. From this evidence it appears that the requirements of section 995, subdivision 2, of the Penal Code were satisfied since there was reasonable ground for the grand jury's conclusion that defendant had violated section 4500 of the Penal Code. It is evident that the ruling of the trial court was correct.

Second: Is section 4500 of the Penal Code unconstitutional in that it results in a denial of due process of law and equal protection of the laws?

charged with an offense in connection therewith, and direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt."

No. This court has upheld the constitutionality of the statute in *People v. Berry*, 44 Cal. 2d 426, 430 (1) (282 P.2d 361), and *People v. Wells*, 33 Cal. 2d 330, 335 et seq. (2a)-3) (202 P.2d 53).

Third: At the time of the assault was defendant undergoing a life sentence for murder in the second degree?

Yes. At the time of the assault defendant was serving a sentence for murder in the second degree, which carries a punishment of from five years to life. (Pen. Code, § 190.) The Adult Authority may fix this sentence at a lesser term than life. However, at the time of the assault here involved it had not so acted. Therefore, under the settled law of the state defendant was undergoing a "life sentence" when he committed the assault. (*People v. Smith*, 36 Cal. 2d 444, 445 (1) (224 P.2d 719); *People v. McNabb*, 3 Cal. 2d 441, 444 (1) (45 P.2d 334); *People v. Wells*, 33 Cal. 2d 330, 334 (1) (202 P.2d 53); *People v. Finley*, 153 Cal. 59, 62 (94 P. 248).)

Fourth: Was the evidence sufficient to justify a finding that defendant was "undergoing a life sentence?"

Yes. The custodian of records at Folsom State Prison produced a certified copy of the judgment and commitment under which defendant was held. This judgment of the Superior Court of Kern County, entered on the 20th day of May, 1949, showed that defendant was guilty of murder in the second degree and was sentenced to the state prison for the term prescribed by law.

The custodian testified that he acted as secretary for the Adult Authority at Folsom State Prison. He said the records disclosed the Adult Authority had not fixed any term for defendant.

In addition, defendant admitted he knew his term had not been fixed by the Adult Authority on the date of the assault.

This constituted substantial evidence to sustain the jury finding that defendant was at the time of the assault "undergoing a life sentence." (See *People v. Wells*, 33 Cal. 2d 330 337-338 (4a)-(4b) (202 P.2d 53).)

Fifth: Did the trial court commit prejudicial error in instructing the jury as follows:

"Section 5077 of the Penal Code of California provides so far as pertinent in this case, that the fixing of sentence shall be determined by the Adult Authority.

"Every prisoner confined in a state prison of the State of California for a term, the maximum of which is life, is in legal effect, serving a life sentence in such state prison until and unless his term is legally reduced to a term less than life.

"A violation of Penal Code, Section 187, to wit, Murder of the Second Degree, is punishable by a term the maximum of which is life imprisonment.

"If, therefore, you find from the evidence, to a moral certainty and beyond a reasonable doubt that the defendant Clifford Jefferson, was, on the 13th day of September, 1952, legally serving a sentence in the state prison of the State of California at Folsom, for a violation of Penal Code Section 187, murder of the second degree, and that his term had not prior to said date, been reduced to a term of less than life, it is your duty to find that the said defendant, Clifford Jefferson, was then and there serving a life sentence and you should so find."

No. The instructions did not take from the jury the question: Did it believe from the evidence that at the time of the assault defendant was serving a sentence for murder in the second degree, the term for which had not been fixed by the Adult Authority? This was the extent of the factual determination to be made by the jury. The length of the punishment

imposed by statute for second degree murder was one to be given to the jury by the court as a matter of law. The instruction was correctly stated and finds full support in *People v. McNabb*, *supra*; *People v. Wells*, *supra*; and *People v. Berry*, 44 Cal. 2d 426, 430 (2) (282 P.2d 861).

People v. Oppenheimer, 156 Cal. 733 (106 P. 74), and *People v. Carson*, 155 Cal. 164 (99 P. 970), decided before the enactment of the indeterminate sentence law, are not applicable in this case.

Sixth: Did the trial court err in refusing to give instructions requested by defendant relating to lesser included offenses?

No. Defendant contends that the trial court committed prejudicial error when it refused to give his proposed instructions (a) relating to lesser offenses, (b) relating to included offenses or attempts, and (c) defining "assault."

In *People v. Finley*, 153 Cal. 59, 63 (94 P. 248); *People v. Carson*, 155 Cal. 164, 175 (99 P. 970); and *People v. Oppenheimer*, 156 Cal. 733, 737 (106 P. 74), decided under Penal Code, section 246 (the predecessor of section 4500 of the Penal Code), a contention similar to that made by defendant here was held untenable.

In *People v. Carson*, *supra*, at page 168, this court held that section 246 of the Penal Code, which read: "Every person undergoing a life sentence in the state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death," was not unconstitutional.

It held the section neither denied to a defendant the equal protection of the law guaranteed by the fourteenth amendment to the Constitution of the United States, nor contra-

vened the provisions of section 11 of article I of the state Constitution declaring that all laws of a general nature shall have a uniform operation. (See also *People v. Finley*, 154 Cal. 59, 62 (94 P. 248); *People v. Quijada*, 154 Cal. 243, 244 (97 P. 689).)

When the Legislature enacted section 4500 of the Penal Code in the same wording as that in the former section 241 of the Penal Code, it presumably knew of the prior decisions construing the section and thus used the same language intending that it be given the same meaning. (*People v. Berry*, 44 Cal. 2d 426, 430 (1) (282 P.2d 861); *People v. Superior Court*, 118 Cal. App. 2d 700, 703 (2) (258 P.2d 1087).)

Seventh: Was there a prejudicial variance between the charge in the indictment and the proof adduced?

No. The indictment was framed in the words of section 4500 of the Penal Code. The evidence disclosed that two persons, Carter and defendant, assaulted Thompson with knives, inflicting 14 or 15 wounds. Defendant was seen stabbing Thompson with a knife and running from the vicinity of the fracas to the Education Building. Two knives with fresh bloodstains were found in the Education Building, one under a water cooler and the other in the drafting room. Thus, regardless of which knife defendant used, there was substantial evidence to justify the jury's finding that one of them was used by him. From the evidence the jury could have concluded which particular knife was used by defendant in making the assault. There is, therefore, no variance between the indictment and the proof.

Eighth: Did the trial court err in refusing to admit in evidence sections 190, 1168, 3020, 3023 and 5077 of the Penal Code?

No. Section 1823 of the Code of Civil Procedure defines "judicial evidence" as the means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.

Section 1875, subdivision 2, of the Code of Civil Procedure provides that courts will take judicial notice of "whatever is established by law." Thus under the code provisions and under the general rules of law, courts take judicial notice of the laws of the state. (*Peck v. Noce*, 154 Cal. 351, 353 (97 P. 865).)

Defendant's offer in evidence of copies of the above sections of the Penal Code was properly refused. These were not evidentiary matters to be submitted to the jury, but presented questions of law upon which the trial judge could instruct the jury if such instructions were proper under the evidence. The record disclosed that the jury was fully and properly instructed as to the law upon all issues presented to it.

Ninth: Did the trial court err in denying defendant's motion for a new trial on the ground of newly discovered evidence?

No. Affidavits of William Carter and Frank Williams in support of the motion purporting to exculpate defendant were filed. A counteraffidavit of Kenneth Wells was also introduced stating that William Carter had subsequently retracted his statement contained in the affidavit he had executed and which was offered by defendant.

The record discloses that counsel for defendant had full opportunity to present this matter at the time of the trial. Carter had already been convicted of being a participant in the same affray, and the evidence of Thompson on the stand disclosed that Williams was also a participant. Thus counsel for defendant was fully aware of the part these affiants

played in the commission of the offense and could have elicited testimony from them at the time of the trial.

Applications for a new trial based upon newly discovered evidence are addressed to the sound discretion of the trial court. In the absence of a clear showing of an abuse of discretion the trial court's ruling will not be disturbed on appeal. (*People v. Smith*, 36 Cal. 2d 444, 449 (224 P.2d 719); *People v. Ross*, 120 Cal. App. 2d 882, 889 (13) (262 P.2d 343; *People v. Parkinson*, 138 Cal. App. 599, 612 (4) (33 P.2d 18).)

It is clear that the trial judge disbelieved both the affidavits of Williams and Carter in support of the motion for a new trial. Since the question of weight and credibility to be attached to the affidavits was for the trial judge, defendant has failed to demonstrate any error or abuse of discretion.

The judgment and order are affirmed.

McCOMB, J.

GIBSON, C. J.

SHENK, J.

CARTER, J.

TRAYNOR, J.

SCHAUER, J.

SPENCE, J.

Concurred.





